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RESTRAINTS

ON THE

ALIENATION OF PROPERTY

BY

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SECOND EDITION

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PREFACE TO THE SECOND EDITION.

"IN 1876 I shared the surprise, common to many lawyers, at the opinion of the Supreme Court of the United States in the case of *Nichols v. Eaton*." So I wrote in the Preface to the first edition. Surprise was an inadequate word.

1 7 1
The people of the United States have many virtues, but all nations have their failings, and there are passages in the history of every country which it is painful for its citizens to contemplate. In our own history, political and social, the pages from which we most gladly avert our eyes are those which record our shortcomings in the matter of commercial honesty.

More than once have we been saved from national repudiation by the integrity and courage of some one man; to save from State repudiation the one righteous man has at times been wanting; and more rehabilitated cheats have lived tolerated, if not honored, in our cities than it is pleasant to think of.

If there is one sentiment, therefore, which it would seem to be the part of all in authority, and particularly of all judges, to fortify, it is the duty of keeping one's promises and paying one's debts.

Nor could it be said that the highest tribunal in the country had been wanting in this matter. Not long be-

fore, it had strained its jurisdiction to the uttermost to compel defaulting towns and counties to pay their obligations; and it had recently declared that no interest in property could "be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors."

When, therefore, the Supreme Court went out of its way to announce that it now repudiated its former doctrine, and that it wished it to be known that property *could* be so fenced about as to secure to it the characteristics of right and enjoyment to the beneficiary and immunity from his creditors, the words came to many persons with a shock. Nor was the shock lessened when the Supreme Judicial Court of Massachusetts, pushing the new doctrine to its extremest limits, held that a man's interest in trust property could be protected from his creditors by simply saying that it should be.

I have written other things, for one motive or another, but this essay wrote itself. While I was musing, the fire burned. *Vae mihi si non erangelizavero.*

If I had written with any expectation of affecting the course of decision, I should have been grievously disappointed. State after State has given in its adhesion to the new doctrine; the courts of Maine, Maryland, Illinois, and Vermont have adopted it; those of Delaware, Indiana, and Virginia have used language which leaves little doubt that they will adopt it at the first opportunity; and in Missouri and Tennessee, where the old doctrine had been expressly declared, it has now been thrown aside, and the new views embraced. Were it not for an occasional dissenting opinion, especially an extremely

able one of Chief Justice Alvey, late of the Court of Appeals of Maryland, I should be *vox clamantis in deserto*.

And yet I cannot recant. Doubtless I may exaggerate the importance of the matter; but, so far as it goes, I still believe, as I said in the first edition, that the old doctrine was a wholesome one, fit to produce a manly race, based on sound morality and wise philosophy; and that the new doctrine is contrary thereto.

To what is the rapid growth of the new doctrine to be referred? It may be used to illustrate the effect of two classes of influences on the law.

In the first place, the influence of a single judge. It is impossible to read the later cases without seeing the great power which the argument of the late Mr. Justice Miller, in the case of *Nichols v. Eaton*, has been in the spread of spendthrift trusts. If Mr. Justice Swayne, who a few years before had given such a clear statement of the older view, had written the opinion in *Nichols v. Eaton*, and if he had been a man of the same intellectual force as Judge Miller, we might have had a *dictum* as elaborate and as strong against spendthrift trusts as we now have in their favor, and the course of the law during the last twenty years would, I am convinced, have been very different from what it has been; without Judge Miller as a guide and example, the courts would not have ventured, as they have, to break out of the ancient enclosures.

But, on the other hand, it is not to the influence of any one man, however able, that the complete overturn of the law can be attributed; when such an abundant

crop has sprung up, the seed must have fallen into ground that was ready to receive it; the spirit of the time has been favorable to it.

One motive which, at other times and in other countries, has led to the establishment of inalienable rights of property, has indeed been absent in this case. The desire, for either social or political reasons, to perpetuate a privileged class whose power and wealth should not be endangered by the weakness or folly of particular members, the desire which led to the enactment of the Statute *De Donis*, and maintains the *Familienfideicommissen* and *Majorats* of the continent of Europe, has not moved our legislators and judges. One of the worst results of spendthrift trusts, it is true, is the encouragement it gives to a plutocracy, and to the accumulation of a great fortune in a single hand, through the power it affords to rich men to assure the undisturbed possession of wealth to their children, however weak or wicked they may be. But there is no reason to believe that the wish to produce such a state of things was present in the minds of those persons who have been responsible for the spread of spendthrift trusts. It is simply one of the cases where the introduction of unsound principles has worked evil results, not only unintended by those who introduced them, but exactly contrary to their wishes.

Among the causes which have produced the frame of mind in which the doctrine of spendthrift trusts has found a congenial home, there must be placed the attempts to avoid payment of money borrowed by the Nation, or by States or municipalities, either through repudiation, or through technical objections, or through debasement of the coin or currency, which have at times been too suc-

cessful, and which have exercised so great an influence on political parties. Such things cannot be without a weakening of the moral sense, of the feeling of imperative duty to use all the money that a man can control for the payment of his debts.

It is worth observing that the Pennsylvania Courts were inaugurating the doctrine of spendthrift trusts, at the time when the epidemic of repudiation which Sydney Smith has immortalized was for the time discrediting that Commonwealth.

An effect, and at the same time a cause, of the state of mind which favors spendthrift trusts appears in the statutes by which large amounts of property are exempted from execution. Judge Miller, with his accustomed acuteness, has observed this. In several of the States property, real and personal, to the amount of thousands of dollars, is exempt, and the exemption laws are gloried in as calculated "to cherish and support in the bosoms of individuals those feelings of sublime independence which are so essential to the maintenance of free institutions." A community which has accustomed itself to look with complacency on a man holding ten or twelve thousand dollars' worth of his own property, and leaving his debts unpaid, is not likely to be troubled by a man's having a life interest under a trust which his creditors cannot reach.

These have been powerful factors in the introduction of spendthrift trusts, but they do not account for everything. Take, for instance, the case of *Broadway Bank v. Adams*, in Massachusetts. The repudiation of national, or state, or personal obligations has never, since Shay's rebellion, found favor in that State, and the exemption

laws are moderate and reasonable. Something may be set down to idiosyncrasies of particular judges; more, to the example of *Nichols v. Eaton*; more still, perhaps, to the ingenuity of counsel; but these will not explain all.

I have no doubt that the speedy acceptance of the doctrine of spendthrift trusts is largely due to the reaction against those doctrines of *laissez faire*, of sacredness of contract, and of individual liberty, which were prevalent during the greater part of the century. How strong that reaction is, how great has been its effect even upon those most unconscious of it, is a fact of which the civilized world has only of late years become clearly aware. It has made rapid progress even since the time when the first edition of this book was published.

The law and the social morality which had established itself in England and in the most civilized parts of the United States during the earlier part of the present century was the completion of that great change wrought under the lead of English lawyers and English philosophers by which, in English speaking countries, mediæval feudalism had given way to the industrial and commercial states of modern times.

The foundation of that system of law and morals was justice, the idea of human equality and of human liberty. Every one was free to make such agreements as he thought fit with his fellow creatures, no one could oblige any man to make any agreement that he did not wish, but if a man made an agreement, the whole force of the State was brought to bear to compel its performance. It was a system in which there was no place for privileges,—privileges for rank, or wealth, or moral weakness. The

general repeal of usury laws was the crowning triumph of the system.

Now things are changed. There is a strong and increasing feeling, and a feeling which has already led to many practical results, that a main object of law is not to secure liberty of contract, but to restrain it, in the interest, or supposed interest, of the weaker, or supposed weaker, against the stronger, or supposed stronger, portion of the community. Hence, for instance, laws enacted or contemplated for eight hours' labor, for weekly payments of wages by corporations, for "compulsory arbitration," &c., that is, laws intended to take away from certain classes of the community, for their supposed good, their liberty of action and their power of contract; in other words, attempts to bring society back to an organization founded on status and not upon contract. To a frame of mind and a state of public sentiment like this, spendthrift trusts are most congenial. If we are all to be cared for, and have our wants supplied, without regard to our mental and moral failings, in the socialistic Utopia, there is little reason why in the mean time, while waiting for that day, a father should not do for his son what the State is then to do for us all.

Of course, it would be absurd to say that the learned judges who have aided in the introduction of spendthrift trusts have been secret socialists; but it is none the less true, I believe, that they have been influenced, unconsciously it may well be, by those ideas which the experience of the last few years has shown to have been fermenting in the minds of the community; by that spirit, in short, of paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism.

Far be it from me to profess to decide between the merits of that scheme of law and morals under which the younger years of those of us who have passed middle life were spent, and of that system which it now looks as if the future might have in store for our descendants; or whether the latter is a step forward or backward. On the one hand no humane man can feel that the industrial and commercial prosperity which flourished under the old system was the highest ideal for a community, and on the other hand no prudent man but must dread lest the amiable altruistic sentiment, to-day so fashionable, dash itself in pieces against the inexorable facts of nature, and our latter end be worse than the beginning. My modest task has been to show, that spendthrift trusts have no place in the system of the Common Law. But I am no prophet, and certainly do not mean to deny that they may be in entire harmony with the Social Code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic.

It may be said that, if the Courts have been wrong in tolerating spendthrift trusts, a remedy is to be found in the legislatures. If the remedy is like that applied in New York, it is, if not worse, more disgusting than the disease. One merit of the theory of the Common Law, whatever may have been its shortcomings in practice, was the absolute equality before it of the rich and the poor. How rich a party to a suit might be (save when necessary to determine the damages to the other party, as on a breach of promise of marriage) was a question never asked in a court of justice.

The Statutes of New York, as interpreted by the Courts, provide that the surplus of income given in trust beyond what is necessary for the education and support of the beneficiary shall be liable for his debts. The education and support to which any and every person is entitled at Common Law is an education at the public schools and a support as a pauper, and his father's history and his own history are matters of no consequence; but now, under the New York Statutes, as interpreted, all this is changed. The Court takes into account that the debtor is "a gentleman of high social standing, whose associations are chiefly with men of leisure, and who is connected with a number of clubs," and that his income is not more than sufficient to maintain his position according to his education, habits, and associations.

[To say that whatever money is given to a man cannot be taken by his creditors is bad enough; at any rate, however, it is law for rich and poor alike; but to say that from a sum which creditors can reach one man, who has lived simply and plainly, can deduct but a small sum, while a large sum may be deducted by another man because he is "of high social standing," or because "his associations are chiefly with men of leisure," or because he "is connected with a number of clubs," is to descend to a depth of as shameless snobbishness as any into which the justice of a country was ever plunged.]

I trust that my strong opinion on the most important question discussed in this essay has not rendered me careless in collecting the authorities, or unfair in the statement of them. I have re-examined all the cases cited in the former edition, and have searched all the reports

published since its date in every jurisdiction where the doctrines of the common law are or profess to be adopted.

With trifling exceptions, all the new matter has been included in brackets []. Such a practice, though common when the work of one man is edited by another, is unusual when the author is himself the editor. But the change in the law treated of in this little book (not merely as to spendthrift trusts, but as to many other matters) has been in several jurisdictions during the last dozen years so rapid and complete as to form an interesting episode in legal history, and in order to aid its consideration, as well as to assist the practitioner in his search for the later cases, the device of brackets has been employed.

J. C. G.

JULY, 1895.

PREFACE TO THE FIRST EDITION.

How far the law will allow a man to enjoy rights in property which he cannot transfer, and which his creditors cannot take for their debts, is a question becoming more and more frequent in this country. In 1876 I shared the surprise, common to many lawyers, at the opinion of the Supreme Court of the United States in the case of *Nichols v. Eaton*, 91 U. S. 716, containing, as it did, much that was contrary to what, both in teaching and practice, I had hitherto supposed to be settled law. Upon investigation, I became convinced that the questions raised by that opinion could be satisfactorily solved only by studying as a whole the history and present condition of the law governing restraints on the transfer of property, both voluntary and involuntary; and I determined that I would at some time collect the authorities for that purpose. The present essay is the result of this determination, the carrying out of which has been delayed by other engagements until now. Begun for my own enlightenment, I publish it as the first attempt, so far as I know, to deal systematically with the whole of a legal doctrine, whose development is, I venture to think, in danger of being marred by too exclusive an attention to particular aspects.

I should add, that the book was substantially written before the publication of the decision of the Supreme Judicial Court of Massachusetts in *Broadway Bank v. Adams*, 133 Mass. 170.

J. C. G.

JULY, 1883.

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RESTRAINTS ON ALIENATION.

§ 1. SOME rights are in their nature inalienable. Such are the rights not to be beaten, not to be slandered, not to be imprisoned. The right to recover damages for battery, for slander, for imprisonment, we can conceive of as transferable, but the original rights themselves are incommunicable. A man may, it is true, have a right that another person, his wife or servant, shall not be beaten; but this right is not the right of the wife or servant transferred to him. It is an independent right.

§ 2. There are other rights whose nature presents no obstacle to alienation, but of which the law, for one reason or another, forbids the transfer. Some, such as rights under ordinary contracts, though not assignable at law, are assignable in equity; but a transfer of others — such, for instance, as the right to recover damages for a libel — will not be recognized in either forum; and, again, a statute will sometimes forbid a transfer which common law or chancery would in its absence have allowed. Thus the St. of 54 Geo. III. (1814), c. 161, § 28, restrains the alienation of the estate settled by Parliament on the Duke of Wellington; and the U. S. Rev. Sts. § 4745, avoids any assignment of a pension.

§ 3. With some exceptions, like those just noted, the rights which are by nature assignable may be transferred, if not at law, at least in equity. If there are any restraints on their free alienation, such restraints are not imposed on them by public policy, but by the will of those persons who have created or transferred them. It is the purpose of this essay to consider how far such restraints can be lawfully imposed; in other words, with what limitations, if any, does the law say, "It is against public policy to allow restraints to be put upon transfers which public policy does not forbid."

§ 4. The current of law has for centuries been in favor of removing old restraints on alienation; in favor of disallowing new ones; and especially in favor of compelling a debtor to apply to his debts all property which he could use for himself or give at his pleasure to others. The legislatures and the courts have co-operated to this end. Family and ecclesiastical pride and natural dishonesty have been formidable obstacles to this movement, but its general success has been unmistakable. Thus, in the first place, land held in fee simple became alienable (Digby, Hist. Law Real Prop., c. 2, § 7; c. 3, sect. 2, § 14); then the courts ruled that land granted to a man and the heirs of his body became freely alienable on the birth of issue (Preamble to the St. of 13 Edw. I. c. 1, De Donis); then came the Mortmain Acts, beginning with Magna Carta (1217), c. 43; then the St. of Westm. II., 13 Edw. I. c. 18 (1285), enacted that land could be taken on *elegit*, for the payment of debts; then, by the St. of Westm. III., Quia Emptores, 18 Edw. I. c. 1 (1290), fines on alienation, except those from tenants *in capite*, were abolished, and subinfeudation done away with; then

the Sts. of Wills, 32 Hen. VIII. c. 1 (1540), and 34 & 35 Hen. VIII. c. 5 (1543), made land devisable ; then, by the St. of 32 Hen. VIII. c. 34 (1540), covenants and conditions annexed to estates for life or years were made to run for and against the assignees of such estates, and of the reversions ; then equity recognized choses in action as assignable ; then came the Sts. of 13 Eliz. c. 5 (1571), and 27 Eliz. c. 4 (1585), against fraudulent conveyances ; then the long series of Bankrupt Acts ; then, by the St. of 12 Car. II. c. 24 (1660), the abolition of military tenures and of fines to the Crown did away with the last restraints upon the transfer of estates in fee simple, either *inter vivos* or by will ; then the Statute of Frauds, 29 Car. II. c. 3, §§ 10-12 (1676), made trust estates subject to execution, and estates *pur auter vie* liable for the debts of deceased tenants ; then, by the St. of 3 & 4 W. & M. c. 14 (1691), the remedy on lands was extended, so that an action lay against the devisees of an obligor ; then came the full recognition of the negotiability of commercial paper, with its numerous extensions in modern times to the bonds of municipal, railway, and other corporations ; then the doctrine that general powers exercised for volunteers are assets for creditors, a doctrine very significant as showing the spirit which animates courts of equity ; and finally the legislation in England of the present century, by which real estate of all kinds, including estates tail, may be sold for payment of debts.

§ 5. In America the course of events has been the same, though in several respects more rapid. Thus, land could be sold or set off on execution here, while in England the clumsy method of an *elegit* was still the only way in which a creditor could reach his debtor's real estate.

§ 6. Some eddies there have been at times in the stream. In the thirteenth century, for instance, estates tail were established, by the statute *De Donis*, to be inalienable estates; and in modern times the courts of Pennsylvania have given effect to "spendthrift trusts," so called. But two hundred years after its passage the statute *De Donis* was substantially repealed by *Taltaram's Case*, 12 Edw. IV. 19, pl. 25 (1472), and already the Chief Justice of Pennsylvania has spoken of spendthrift trusts as contravening "that general policy which forbids restraints on alienation and the non-payment of honest debts," and as being tolerated, but not approved of, by the law. *Overman's Appeal*, 88 Pa. 276, 281 (1879). See § 234, *post*.

§ 6 *a*. [The preceding section stands as in the first edition; but spendthrift trusts have spread beyond Pennsylvania, and it would, to say the least, be premature to speak of their introduction as an eddy. Another movement in the same direction is seen in the statutes by which many of the United States exempt large parts of a debtor's property from execution. Of these modern developments the former seems largely due to sentimental considerations; the latter rather to the dislike of creditors as a class so common in agricultural communities. See § 263, *post*, note.]

§ 7. Such errors as have arisen in discussing restraints on alienation are largely due to the subject having been dealt with disconnectedly. If the restraint was in the form of a condition, it was treated with conditions. If it was in the form of a direction to a trustee, it was treated with trusts. Involuntary alienation, or liability for debts, has been considered without reference to voluntary trans-

fers. It will be a gain to clear thought to bring the whole subject together.

§ 8. The Rule against Perpetuities is sometimes spoken of as aimed at restraints against alienation. In a sense this is true. Exccutory devises and other future interests, to limit which is the object of the rule, render an estate less marketable, and therefore the rule does, to this extent, favor alienation. But, speaking strictly, and as the expression is used here, a future interest is not a restraint on the alienation of an estate unless the contingency upon which the future interest depends is itself the alienation of the estate. The owner of an estate subject to a future interest can grant all that he has got, and the grantee has everything that the grantor would have had if the transfer had not been made.¹

§ 9. In every case of an alleged attempted restraint upon alienation two questions arise: 1. What restraint was it intended to impose? 2. Is the intended restraint lawful? It is the second class of questions, viz. what restraints on alienation are lawful, which will be considered. The first class of questions, or questions of construction, will be spoken of only incidentally.²

§ 10. Restraints on alienation are sought to be effected in two ways:—

First. No attempt is made to attach any character of

¹ [As to the gradual differentiation of the Rule against Perpetuities from the general doctrines on restraint upon alienation, see an article by the author, "Remoteness of Charitable Gifts," 7 Harvard Law Rev., 406, 409-412.]

² The cases in which these questions of construction present the most difficulty arise on limitations over of life interests upon alienation, the doubt being whether involuntary alienation, such as bankruptcy, is intended by the language used. The learned reader will find the cases collected in 2 Jarm. Wills (5th ed.), 870-877.

inalienability to the estate, but the estate is given either on condition that it shall not be alienated, or until it is alienated ; that is, it is subject either to a condition for breach of which the grantor may enter, or to a limitation which, upon alienation, puts an end to it without entry. The owner of the estate may assign it as he pleases ; he is not compelled to keep it against his will, but on assignment it is forfeited, or liable to forfeiture.

Second. The estate may be declared inalienable. If this declaration is legally valid, then the holder of the estate cannot assign it ; any attempted assignment is inoperative ; the estate remains with him ; he cannot rid himself of it.

The subject will be considered under these two heads, and under each in turn will be taken up, — (1.) Estates in Fee Simple ; (2.) Estates Tail ; (3.) Estates for Life ; (4.) Estates for Years. In the 1st, 3d, and 4th, absolute interests, life interests, and interests for years in personal property, will be respectively included. There is no interest in personal property corresponding to an estate tail.

I.

FORFEITURE FOR ALIENATION.

A.

ESTATES IN FEE SIMPLE.

§ 11. THE alienation against which the threat of forfeiture is made may be, (1.) alienation generally, i. e. to any one, at any time, under any circumstances; or it may be alienation (2.) to certain persons; or (3.) within a certain time; or (4.) in a certain manner, as by mortgage. Closely connected is (5.) the question whether an estate in fee simple can be forfeited for failure to alienate it; the shape in which this question usually arises in practice being that of a gift over of property, in case the owner should die without having disposed of it in his lifetime or by will.

§ 12. Upon the point of validity, it is immaterial whether the provision intended to terminate an estate is in the form of a condition or of a conditional limitation. As we shall see, it has sometimes been said that in the case of a life estate there is a difference in this respect between a condition and a limitation, (§§ 79, 80, *post.*) but no distinction has ever been suggested in the case of a fee. [But see *Camp v. Cleary*, 76 Va. 140, § 29 *a*, *post.*]

1. *Unqualified Restraint on Alienation.*

§ 13. In a fee simple a condition or conditional limitation on alienation generally is void. This is now past dispute.

§ 14. In the earliest times it is doubtful how far land was alienable. [Digby, *Hist. Law Real Prop.*, c. 1, sect. 1, § 2.] At the end of the twelfth century, it appears, from Glanville, that the holder of land could not alienate the whole of it from his heir; the lord, however, of whom the land was held does not seem to have been considered as having any rights in the matter. Glanville, lib. 7, c. 1 (Beames's ed.), pp. 137-150; Digby, c. 2, § 7.

§ 15. But in Magna Carta, c. 39 (1217), it is provided, "Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terræ suæ possit sufficienter fieri domino feodi servitium ei debitum quod pertinet ad feodum illud."

§ 16. Bracton, who wrote in the reign of Henry III., says that it is "generaliter verum" that the tenant can alienate the land at his pleasure, "nisi ad hoc specialiter agatur in possessione ne possit," thus recognizing the legality of restraints upon alienation. Bract., lib. 2, c. 19, fol. 45. [So, in another place, he says land can be given to "viri religiosi," or to Jews, "nisi modus donationis inducat contrarium, scilicet quod licitum sit donatorio rem datam dare vel vendere cui voluerit, exceptis viris religiosis et Judæis, et quod talibus personis dari non poterit sicut aliis, nulla ratio vel necessitas illud inducit, nisi tantum modus donationis." Id., lib. 2, c. 5, fol. 13.] See Digby, c. 3, sect. 2, § 14.

§ 17. The statute of Quia Emptores, 18 Edw. I. c. 1

(1290), forbade subinfeudation, but gave full power to tenants to alienate their land at pleasure.

§ 18. Britton was written in the reign of Edward I., but after the statute of *Quia Emptores*, which is spoken of in lib. 3, c. 4, § 20, as “*novele constitucioun.*” It is there said (lib. 2, c. 8, § 6), “Sometimes a gift may be enlarged, sometimes restricted. . . . It may be restricted as follows. . . . In another way thus: ‘to hold to him and his heirs without making alienation,’ or ‘without making alienation to such a one,’ or ‘except to such a one.’” See the note of the learned editor, Mr. Nichols, lib. 2, c. 5, § 2, that in the time of Britton the effect of the statute of *Quia Emptores* was not apparent.

§ 19. But in 33 Ass. pl. 11 (1359), Green, J. said that a condition not to alien upon a feoffment in fee was void; [in 16 Hen. VI. (1438), as reported Stath. Abr. Conditions, it was said (*qu. per Serjeant Newton*) that a condition against alienation annexed to a term for years was good, but that “if I enfeof a man on such a condition, the condition is void, because it is repugnant (contrarious) ”], and in 21 Hen. VI. 33, pl. 21 (1443), Paston and Yelverton, JJ., agreed that such a condition was bad.¹ In 8 Hen. VII. 10, pl. 3 (1493), Huse, C. J., and Fairfax, J., said the same. In 10 Hen. VII. 11, pl. 28 (1495), Serjeant Keeble said, *arguendo*, that if a grant be made to a man in fee, leaving out the word “assigns,” with a proviso that he does not alien, the condition is good, “*quod fuit negatum per plurimos.*” And finally, in 13 Hen. VII. 22, 23, pl. 9 (1498), upon Serjeant Keeble attempting to argue that a condition on a fee simple not

¹ [According to the report of this case, the same thing was said 24 Ass. pl. 8 (1350), but 24 Ass. as printed contains only seven placita.]

to alien was good, "Bryan, C. J., interrupted him, and said that they would not hear him argue this conceit, because it is simply contrary to common learning, and is now, so to speak, a principle (*in manere un principal*), because in this way we should transpose all our old precedents. Therefore speak no more of this point." [But see Serjeant Kingsmill's remark, 21 Hen. VII. 11 (1506).] The matter is now at rest. 21 Hen. VII. 8. Doct. & St., Dial. I. cc. 24, 29; Dial. II. c. 35. Lit. § 360. Co. Lit. 206 *b*, 223 *a*. [Shep. Touch. 129.] *Ware v. Cam*, 10 B. & C. 433. *Willis v. Hiscox*, 4 Myl. & Cr. 197, 201, 202. [*Re Rosher*, L. R. 26 Ch. D. 801. See *Bragg v. Taund*, New Benl. 89;] *Hood v. Oglander*, 34 Beav. 513; [*Shaw v. Ford*, 7 Ch. D. 669, 674; *Martin v. Martin*, 19 L. R. Ir. 72, 80; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381. The law is the same with equitable estates in fee simple. *Re Dugdale*, 38 Ch. D. 176. *Corbett v. Corbett*, 13 P. D. 136; s. c. 14 P. Div. 7.¹]

§ 20. The reason sometimes given for this prohibition of conditions against alienation is that the statute of Quia Emptores, by putting an end to subinfeudation, did away with reversionary interests after a fee simple. This was the reason given by Yelverton, J., 21 Hen. VI. 33. So in 8 Hen. VII. 10, Huse, C. J., and Fairfax, J., said that a gift in tail or a lease for life might be made on condition not to alien, because there was a reversion, otherwise with a feoffment. In *Ruddall v. Miller*, 1 Leon. 298, Serjeant Flectwood, *arguendo*, said, "Before the statute of Quia

¹ [A covenant not to alien land held in fee simple has been said to be good as an obligation. Co. Lit. 206 *b*; *Broad v. Jollyffe*, Cro. Jae. 596. But see 1 Sm. L. C. (9th ed.) 461; Marsden on Perp. 89. Cf. § 77, *post*. Of course such a covenant would not run at law, nor bind an assignee in equity. Cf. *McLean v. McKay*, L. R. 5 P. C. 327.]

Emptores Terrarum, if A. had enfeoffed B., upon condition that B. nor his heirs should alien, the same was a good condition (which was granted *per curiam*).” And thus Lord Coke: “So it is said that then [i. e. before the statute *Quia Emptores*] the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter; and so it is in the King’s case at this day, because he may reserve a tenure to himself.” Co. Lit. 223 *a*. And see [*De Peyster v. Michael*, 6 N. Y. 467, 491, 492;] *Van Rensselaer v. Demmison*, 35 N. Y. 393; *Mandlebaum v. McDonell*, 29 Mich. 78, 95; [*Murray v. Green*, 64 Cal. 363, 367.]

§ 21. This reason serves to justify the distinction which undoubtedly exists between conditions against alienation attached to fees, and those attached to lesser estates. But, notwithstanding this, the absence of reversionary interest cannot be the real reason for the rule, for that would strike at the root, not only of unqualified conditions against alienation, but of qualified conditions against alienation, and indeed of all conditions on fees whatever. Paston, J., 21 Hen. VI. 33, in opposition to Yelverton, says that the presence or absence of a reversion is not the test of the validity of a condition, and that the reason for holding a condition invalid is “le inconveniencie”; and in 33 Ass. pl. 11, it is said that a condition on a fee not to alien would be bad, for it would be “discordant a la ley” that the tenant should have a fee, and yet could not alien. See 1 Sm. L. C. (7th Am. ed.) *101; 20 Am. Law Reg. (N. S.) 185 *et seq.* In truth, the rule seems not to allow nor call for any reason except public policy.¹

¹ The statement of Lord Coke, Co. Lit. 223 *a*, that a condition not to alien, attached to a grant in fee by the King, is valid, has been repeated.

§ 22. In *Re Machu*, 21 Ch. D. 838, A. gave land by will to his daughter E. and her heirs, "subject, nevertheless, to the proviso hereinafter contained for determining her estate and interest on the event therein mentioned." The proviso was, that if E. should be declared a bankrupt, or liquidate with her creditors, or avail herself of any act for the relief of insolvent debtors, then the devise to her should be void, and the premises devised to her should go to her children. Chitty, J. held that the proviso was void.¹ [So in *Re Dugdale*, 38 Ch. D. 176, land was given

Shep. Touch. 130; Chitty, Prerog., 386, note *h*, 388; *Fowler v. Fowler*, 16 Ir. Ch. 507. But its sole support is a *dictum* of Vavasour, J., 21 Hen. VII. 8 *a*, pl. 6 (1506), and the reason given by him is not that suggested by Lord Coke, but because "every deed that the King makes shall be taken most beneficially for him." See [*Fisher v. Gaffney*, 5 N. S. W. L. R. 276;] 20 Am. Law Reg. (N. S.) 188. [In Doct. & St., Dial. II. c. 35, the author supposes that on a feoffment made to an abbot and his successors a condition against alienation would be good; and Preston, in his edition of the Touchstone, p. 130, assumes that this is because the grantor has a right to the land on the dissolution of the corporation; but there is no such suggestion in Doct. & St. On the alleged right of the feoffor to the land on the dissolution of the corporation, see Gray, Rule against Perpetuities, §§ 44-51.]

¹ The learned judge considered that the proviso purported to create a condition, and not a conditional limitation. It certainly did not purport to create a condition, for upon a condition there can be no gift over to a third person; none but the heir can take advantage of it. The term "conditional limitation" is used in two senses. In the sense in which it is generally employed by courts and writers, it is a generic term, comprising two species, (1.) shifting uses, and (2.) shifting executory devises, and is a proviso cutting short an estate previously created, and substituting another in its stead. This is the sense in which it is used in this essay. It is very convenient to have such a common term for shifting uses and executory devises; but, unfortunately, some writers have confused legal nomenclature by attempting to use it in another sense. With them it means a proviso operating to determine an estate by its intrinsic force, but not by itself substituting another. In a devise to A. and his heirs, *but if A. dies unmarried then to B. and his heirs*, the words in italics form a conditional limitation in the first sense; while in a devise to A. *so long as he remains*

in trust for A. and his heirs, but if A. should do, execute, commit, or suffer any act or thing whereby or by operation of law he would be deprived of the personal beneficial enjoyment of the property, then it should be held in trust for A.'s wife and children. The provision was held void. See *Corbett v. Corbett*, 13 P. D. 136 ; s. c. 14 P. Div. 7 ; *Metcalf v. Metcalf*, 43 Ch. D. 633. But cf. *Pearson v. Dolman*, L. R. 315, 320, § 49, *post.*]

§ 22 a. [Abstaining from alienation may be made a condition precedent to the vesting of an estate in fee, but

unmarried, the words in italics form a conditional limitation in the second sense. A proviso of this latter kind is generally called a special limitation. Among the treatises in which the term "conditional limitation" is used in the first sense are, Fearne, Cont. Rem. 14, 15 ; Butler, notes to Fearne, Cont. Rem. 381 ; Smith, Executory Interests, § 149 ; 3 Prest. Abs. 284 ; Williams on Settlements, 21 ; 2 Cruise, Dig. 238 ; 4 Kent, Comm. 249, 250. See Gilbert, Uses (Sugd. ed.), 178, note. [In *Re Dugdale*, 38 Ch. D. 176, 179, 180, Kay, J. seems to use "conditional limitations" as not including shifting executory devises, and as a synonym merely of shifting uses. This makes the term superfluous, and is contrary to the best usage.] Those treatises in which the term is used in the second sense are, 1 Sand. Uses (5th ed.), 155, 156 ; 1 Steph. Comm. (8th ed.) 295, note (k) ; 1 Leake, Land Law, 216, note (a) ; Tud. L. C. on Real Prop. (3d ed.) 347, 348.

In *Re Machu*, the gift certainly purported to be a conditional limitation in the usual sense. Whether in the second sense of the term a fee simple can have a conditional limitation, see 1 Leake, Land Law, 36, note (d) ; [Gray, Rule against Perpetuities, §§ 31-42 ; *First Univ. Soc. v. Boland*, 155 Mass. 171.] Chitty, J. left undecided the question whether a fee could have a conditional limitation in this sense at all. P. 843. He seemed to think that, if a conditional limitation in this sense could exist at all, the validity of such a limitation conditioned on bankruptcy was arguable, although apparently his inclination was against it. P. 842. But it is submitted, that there can be no rational distinction between restraining the alienation of a fee by a conditional limitation in the usual sense, and restraining it by a conditional limitation in the second sense, — that is, by a special limitation, — even if a fee can be created with any special limitation at all. See §§ 79, 80, *infra*. [But see *Camp v. Cleary*, 76 Va. 140, § 29 a, *post.*]

if an estate in fee is vested, though not in possession, yet in reversion or remainder, a condition against alienation is bad. See *Mandlebaum v. McDonell*, 29 Mich. 78; *Powell v. Boggis*, 35 Beav. 535.¹

§ 23. As in England, so in America, a condition, or a conditional limitation, restraining an owner in fee simple from selling his land, is bad. [*Potter v. Couch*, 141 U. S. 296.] *Henning v. Harrison*, 13 Bush, 723. *Pardue v. Givens*, 1 Jones, Eq. 306. [*Munroe v. Hall*, 97 N. C. 206.] *Schermerhorn v. Negus*, 1 Denio, 448. *Walker v. Vincent*, 19 Pa. 369. *Naglee's Appeal*, 33 Pa. 89. *Lario v. Walker*, 28 Grant, 216. [*Re Watson and Woods*, 14 Ont. 48. *Kahanaiki v. Khala Sugar Co.*, 6 Hawaii, 694.] These cases are decisions directly in point, and *dicta* to the same effect are found in abundance; e. g. in *Taylor v. Mason*, 9 Wheat. 325, 350; *McDonogh v. Murdoch*, 15 How. 367, 412; *Andrews v. Spurlin*, 35 Ind. 262, 268; [*Allen v. Craft*, 109 Ind. 476, 483;] *Deering v. Tucker*, 55 Me. 284, 289; *Hawley v. Northampton*, 8 Mass. 3, 37; *Gray v. Blanchard*, 8 Pick. 284, 289; [*Todd v. Sawyer*, 147 Mass. 570; *Winsor v. Mills*, 157 Mass. 362, 364;] *Turner v. Fowler*, 10 Watts, 325; *Reifsnyder v. Hunter*, 19 Pa. 41; [*Jaureche v. Proctor*, 48 Pa. 466; *Appeal of St. Luke's Church*, 1 Walk. (Pa.) 283;] *Grant v. Carpenter*, 8 R. I. 36; *Doe d. McIntyre v. McIntyre*, 7 U. C. Q. B. 156; *McMaster v. Morrison*, 14 Grant, 138, 141; *Crawford v. Lundy*, 23 Grant, 244, 250; *Fulton v. Fulton*, 24 Grant, 422; [*James v. Gard*, 13 Viet. L. R. 908, 913.] See *Dehorty v. Jones*, 2 Harrington (Del.), 56, note; *Newkerk v. Newkerk*, 2 Caines, 345; [*Bassett v. Budlong*, 77 Mich. 338; §§ 113 *et seq.*, *post.*]

¹ [The head note in *Powell v. Boggis* gives no idea of the decision.]

§ 24. The only suggestion to the contrary is a remark in *Bridge v. Ward*, 35 Wis. 687. In this case a testator devised to his son a life estate in land, and restricted him from selling it. It was held that the son's interest could be sold on execution against him. The court say, "It is quite probable that the will might have been so framed that an alienation of the plaintiff's interest," either voluntary or involuntary, "would determine his estate." They cite a passage from Redfield on Wills to that effect, and then add: "And again he [Redfield] states as a rule, 'that either a life or an absolute estate by bequest may be legally so framed as to cease upon the happening of a particular event.'" The passage cited from Redfield is in the second volume (3d ed.), p. 289. He is giving the propositions to be deduced from the opinion of Turner, V. C., in *Rochford v. Hackman*, 9 Hare, 475, and says they are: "(1.) That property cannot be given either for life or absolutely, without the power of alienation being incident to the gift. (2.) That either a life or an absolute estate by bequest may be legally so framed as to cease upon the happening of a particular event." It might seem from the context that it was intended to imply that an absolute estate might be made to cease upon the happening of an attempt at alienation, but the learned commentator does not say so, and it is perhaps unnecessary to remark that no semblance of such an idea is to be found in *Rochford v. Hackman*. [See § 49, *post*. In *Wieting v. Bellinger*, 50 Hun, 324, 329, there are some careless expressions, but probably no intention to contradict the established doctrine.]

§ 24 a. [In *Murray v. Green*, 64 Cal. 363, land was conveyed to A. and his heirs, as to one undivided half to

the use of A. and his heirs, and as to the other half in trust for B. and his heirs, *provided* that A. should not sell either half without B.'s consent. It was held that, so far as A.'s own half was concerned, the condition was void.]

§ 25. [In *Anon.*, 8 Hen. VII. 10 (1493), the defendant in replevin avowed that J. held of him by homage, fealty, and rent; that at each alienation by his tenant the defendant and his ancestors prescribed to have the best beast for a heriot, unless the alienee gave notice to the lord before the death of the feoffor; that J. had aliened to the plaintiff, and died; that the plaintiff gave him no notice; and that he distrained for the heriot. Huse, C. J., and Fairfax, J., thought the prescription good. In the Touchstone it is said: "In Pasch. 19 Jac. B. R., it was held by Just. Dodridge and Chamberlain that if a feoffment be on condition that if the feoffee alien he shall pay 10*l.* to the feoffor, that this is a good condition; but Ch. Just. [Ley] and Just. Houghton held the contrary, for then this shall be a circumvention of the law." Shep. Touch. 130. This case is reported *sub nom.* *Bragge v. Stanner*, Palm. 172, and *sub nom.* *Bragg v. Taund*, New Benl. 89. It was *assumpsit* on an agreement by the defendant to pay 100*l.* if he should longer exercise the trade of a linen draper in Newgate market; so the alleged holding could have been only a *dictum*; it is not mentioned in either report. In *Billing v. Welch*, Ir. L. R. 6 C. L. 88, 101, 102, the passage in the Touchstone was referred to, and the opinion of the Chief Justice and Houghton, J. was approved and followed (see § 37, *post*); and it was also approved and followed in *Re Rosher*, 26 Ch. D. 801 (see § 51, *post*).] In *King v. Burchell*, Amb. 379, a provision that an estate tail should be charged with a sum of money on its aliena-

tion was held void, and a like condition on a fee simple has been held bad in New York. *De Peyster v. Michael*, 6 N. Y. 467. *Overbagh v. Patrie*, 8 Barb. 28; s. c. 6 N. Y. 510, overruling the *dicta* of Platt, J., in *Jackson v. Schutz*, 18 Johns. 174, 184-187, and of Nelson, C. J., in *Livingston v. Stickles*, 7 Hill, 253, 257. The question would now doubtless everywhere meet a like decision. [In *Wieting v. Bellinger*, 50 Hun, 324, a testator devised land to his son C., on condition that if C. became so embarrassed that the land had to be sold by sheriff's or other public sale, \$1500 should be kept out of the sale and divided among all the testator's children. It was held that the condition was void.]

§ 25 a. [In *Hodgdon v. Clark*, 84 Me. 314, A. conveyed land to B. in fee, and B., at the same time, gave a mortgage back to A. to secure a bond conditioned that B. would not convey or assign the land in any other way or for any other consideration than to secure his own support and maintenance during his life, and that, if the land was conveyed for that purpose, the balance between the compensation for said support and the just valuation of the premises should be paid to certain of B.'s children. B. conveyed the land to C., taking back a mortgage to secure his support during his life. B. and C. brought a bill in equity to have the mortgage to A. set aside as a cloud on their titles. The bill was dismissed, the court holding that the mortgage was not void. The decision seems questionable. B. held the land in fee simple subject to no trust except in the case of his alienating it; but, if he sold, part of the price was to be paid over to others; this seems an illegal provision for forfeiture. On the validity of a bond conditioned not to alienate a fee simple, see §§ 19, *ante*, 77, *post*.]

§ 26. In *Jackson v. Schutz*, 18 Johns. 174, it was held that a condition on a grant in fee not to sell without offering to the grantor was good, and this has been approved in *Overbagh v. Patrie*, 8 Barb. 28, 34, and *De Peyster v. Michael*, 6 N. Y. 467, 491; but perhaps the desire not utterly to demolish *Jackson v. Schutz* may have prompted the approval. Such a condition, if good, would greatly clog the conveyance of land. The question deserves careful reconsideration. [See *Re Rosher*, 26 Ch. D. 801, § 51, *post*. In *Hardy v. Galloway*, 111 N. C. 519, the grantor of land retained for himself and his heirs the right to repurchase the land when sold, and stipulated that, if the grantee should sell or mortgage the land without giving the grantor and his heirs the right to repurchase, the deed should be void. The condition was held bad as repugnant. On the validity of a bond conditioned not to alienate a fee simple, see §§ 19, *ante*, 77, *post*.]

§ 27. A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land. Co. Lit., 223 a. *Bradley v. Peixoto*, 3 Ves. Jr. 324. *Rishton v. Cobb*, 5 Myl. & Cr. 145. *Re Jones's Will*, 23 L. T. N. S. 211. [*Re Dugdale*, 38 Ch. D. 176. *Metcalf v. Metcalfe*, 43 Ch. D. 633. *Corbett v. Corbett*, 13 P. D. 136; 14 P. Div. 7. *Barker v. Davis*, 12 U. C. C. P. 344.] This is as true of [reversionary interests as of interests in possession, *Powell v. Boggis*, 35 Beav. 535, and of] chattels real as of chattels personal. Therefore, although, as we shall see, (§§ 101, 102, *post*,) on a lease for years the lessor can impose a condition against alienation upon the lessee, the lessee on making an assignment cannot impose such a condition upon his assignee, for the lessee is

transferring his whole interest, while the lessor is not. Co. Lit. 223 *a*. Such a condition upon an assignment of a lease seems to have been held good in *Doe v. Hawke*, 2 East, 481, without any objection occurring to either court or counsel. The only point discussed was whether the condition was broken: its validity was assumed. But, it is submitted, this decision cannot be supported. [See *Potter v. Couch*, 141 U. S. 296, 317.] Chattels real and chattels personal stand alike, and Lord Coke expressly says that conditions against alienation are void with one equally as with the other.

§ 28. In *Williams v. Ash*, 1 How. 1, male and female slaves were bequeathed to A., provided he should not sell them, in which case they should be free. A. sold a male slave. Held, that he was free. Taney, C. J., in giving the judgment of the court, said: "If, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold, . . . it is evident, upon common law principles, that the limitation over would have been good. 2 East, 481." The case cited is *Doe v. Hawke*, where, as is stated in the preceding section, the court seem to have overlooked the distinction between a condition against alienation attached to an estate for years in its creation, which is good, and such a condition attached to the transfer of an estate for years when created, which is bad. In *Stewart v. Williams*, 3 Md. 425, *Williams v. Ash* is said to have established the law in Maryland. The prohibition against selling was, it would seem, confined to the life of the devisee; it was certainly confined to the life of the male slave. As to whether it could be sustained as confined to a limited time, see §§ 45 *et seq.*, *post*; but unless on

such ground, the decision, it is submitted, can be supported only as made *in favorem libertatis*. [See *Peggy v. Legg*, 6 Munf. 229; *Smith v. Dunwoody*, 19 Ga. 237, 260. In *Potter v. Couch*, 141 U. S. 296, 316, 317, the Supreme Court of the United States said that the decision in *Williams v. Ash* “turned upon the local law,” and that the *dictum* of Chief Justice Taney, cited above, “if applied to a conditional limitation to take effect on any and all alienation, and attached to a bequest of the entire interest, legal or equitable, even in personalty, is clearly contrary to the authorities.”]

§ 29. It was held, in *French v. Old South Society*, 106 Mass. 479, that a pew in a church in Boston, where pews are personalty, was a peculiar species of property, and might be laid under restrictions against alienation. See § 42, *note, post*. [And in *Pearson v. Hartman*, 100 Pa. 84, in the deed of land for a churchyard, a right reserved to the grantor and every member of his family or their offspring to mark off one square perch of ground “for their own and separate use forever for the burial of their dead,” was held not assignable.]

§ 29 *a*. [In *Camp v. Cleary*, 76 Va. 140, A. executed a deed by which he conveyed two pieces of land, X. and Y., to B. in fee, and by which he also conveyed to B. for life another piece of land, Z., on which a mausoleum had been built. The deed recited the grantor’s wish that the mausoleum should be forever consecrated to the pious use for which it had been designed, and continued thus: “I do solemnly enjoin and restrict [B.] from ever selling, alienating, leasing, mortgaging, or disposing of the same in any manner whatsoever; and I do hereby give and grant to him the said land and mausoleum, upon the condition

that if he shall ever sell, give, lease, mortgage, or in any way whatsoever alienate or dispose of the said land, or any part thereof, this deed shall cease and be void, and the said last-mentioned piece of land, with the other two lots conveyed to him in fee, shall revert to and vest in [E.] and her heirs." B. sold part of lot Z. The Court of Appeals of Virginia held that E. was entitled to all the lots, X., Y., and Z. The court, while not denying that a condition against alienation attached to a fee simple was void, was of opinion that a conditional limitation over upon alienation was good. But in a question depending upon public policy, the technical form of putting an end to a fee simple upon alienation must be immaterial. No such distinction is recognized in the decisions. The following were all cases of conditional limitations, that is, of gifts over, upon alienation, and not of conditions. *Ware v. Cam*, 10 B. & C. 433. *Willis v. Hiscox*, 4 Myl. & Cr. 197, 201, 202. *Re Dugdale*, 38 Ch. D. 176. *Corbett v. Corbett*, 13 P. D. 136; 14 P. Div. 7. *Metcalfe v. Metcalfe*, 43 Ch. D. 633. *Potter v. Couch*, 141 U. S. 296. In *Re Dugdale*, Kay, J., said: "It is clearly settled that a gift over upon an attempt to alien an absolute interest previously given is as void as a condition. . . . A limitation to A. 'and his heirs,' but if he attempt to alien, to B. in fee, is an invalid gift over. So also where the limitation is to A. 'and his heirs' until he attempt to alien, and thereupon to B. and his heirs. This is as clearly a conditional limitation as the other, because a fee simple endures forever, and any attempt to cut it down must be a defeasance." 38 Ch. D. 180, 181. In *Metcalfe v. Metcalfe*, Kekewich, J., said: "You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because

it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personalty. In favor of the will, which must be read and construed as a whole, you can allow such a proviso to defeat any particular estate, not as operating to take away that which has already been given, but as restricting the quantity of the original gift; but an estate in fee, or its equivalent, an absolute gift of personalty, does not admit of such treatment." 43 Ch. D. 639. So in *Potter v. Couch*, Gray, J., said: "In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. . . . For the same reason a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable." 141 U. S. 315. The Virginia court refers to *Rochford v. Hackman*, 9 Hare, 475, but Turner, V. C., in that case was scrupulously careful to confine his remarks to life estates. See § 49, *post.*]

§ 29 *b*. [There is a passage of Lord Coke which might plausibly have been invoked to sustain the decision in *Camp v. Cleary*: "If A. be seised of Black Acre in fee, and B. enfeofeth him of White Acre, upon condition that A. shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnaney to the state passed by the feoffment." Co. Lit. 223 *a*. No authority is cited for this, and if it now is or ever was law, which may reasonably be doubted, it would probably not apply where White Acre and Black Acre, as in *Camp v. Cleary*, passed by one deed.]

§ 29 c. [Obligations or rights *in personam*, arising from either tort or contract, are generally not assignable in law, and sometimes not in equity. See §§ 1, 2, *ante*. There are certain contracts not of themselves assignable at law, which yet the law allows the obligor to make assignable. Thus a written promise to pay a certain sum of money on a day fixed to A. is not assignable, but if the promisor makes the sum payable to A. or his order, or to A. or bearer, then A. can assign it. But the only instance where common law or equity allows a transfer of a right *in personam* without a special agreement, and yet enforces an agreement restraining transfer, is believed to be in the case of policies of insurance. With marine and fire insurance, where the agreement is to insure A. on certain property, the contract naturally comes to an end when A. ceases to own the property, but if A. should keep the property and assign the policy, although the assignee can, in the absence of agreement, recover in equity on the policy, yet a stipulation that A. cannot assign will be respected. There is good reason for this, for the contract is essentially one of indemnity, and it is not desirable that a man should gain by the destruction of property who has no interest in its preservation. In life insurance there is also good reason for allowing the assignment of policies to persons not interested in the life to be restrained, and indeed, in many jurisdictions, such an assignment is forbidden by law. As the contract of life insurance is not a contract of indemnity, it may be that a restraint on assignment to a person interested would not be allowed. But no case is known where the validity of such a restraint has been called in question. And the nature and amount of the interest of the person to be benefited

under a policy may be a serious matter to an insurance company, and one on which it would seem just to allow it a voice. Probably, therefore, a restriction on the assignment of a policy of life insurance, even though to a person interested in the life, would be upheld.]

§ 29 *d*. [The interest of a partner in a partnership, or of a shareholder in an unincorporated or incorporated company, may also be made non-assignable. In the absence of agreement the right of a partner is generally presumed to be non-assignable, and of a shareholder to be assignable; but this may in both cases be changed by the terms of the articles or by-laws. The law does not force fellowship on any one without his consent.]

§ 30. A covenant to hold lands in common, or a condition that they shall not be subject to partition, has been held a bar to a petition for partition. *Hunt v. Wright*, 47 N. H. 396. *Coleman v. Coleman*, 19 Pa. 100. *Avery v. Payne*, 12 Mich. 540. So a direction in a devise to two women, that the land devised should be kept together until one of them married. *Hill v. Jones*, 65 Ala. 214. See *Peck v. Cardwell*, 2 Beav. 137. In *Hunt v. Wright* it was said that such a condition does not render the undivided shares inalienable, and that it could not be repugnant to the estate, because at common law tenants in common could not be compelled to make partition (Lit. § 318), the right to compel partition being first given to them by St. 31 Hen. VIII. c. 1. In *Mitchell v. Starbuck*, 10 Mass. 5, 11, 12, it was ruled that a plea of a prescription not to part was bad, such prescription being against the law, inasmuch as it was "essential to an estate in common to be subject to partition"; and in *Black v. Tyler*, 1 Pick. 150, it was ruled

that an agreement to hold in common, not under seal, was no bar to a petition for partition, though perhaps there might be a remedy in equity. See [*McDonogh v. Murdoch*, 15 How. 367, 412;] *Fisher v. Dewerson*, 3 Met. 544; *Spaulding v. Woodward*, 53 N. H. 573; *Richardson v. Merrill*, 21 Me. 47; *Smith v. Clark*, 10 Md. 186; [*Lovett v. Kingsland*, 44 Barb. 560; s.c. *sub nom. Lovett v. Gillender*, 35 N. Y. 617; *Greene v. Greene*, 54 Hun, 93; s. c. 125 N. Y. 506; *Purdue v. Givens*, 1 Jones, Eq. 306;] and § 64, *post*. Whatever the true doctrine may be, a prohibition against partition is not a restraint on alienation, as the undivided share is always assignable, and therefore it is only spoken of here incidentally.

2. *Restraints on Alienation qualified as to Persons.*

§ 31. In 8 Hen. VII. 10, pl. 3, Huse, C. J., and Fairfax, J., said that a condition not to alien to a particular person was good. Littleton, § 361, says, "If the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good." See [*Braet.*, lib. 2, c. 5, fol. 13, § 16, *ante*; *Madox*, Form. Angl., 196, 197; *Co. Lit.* 223;] *Doct. & Stud.*, Dial. II. c. 35; *Shep. Touch.* 129. [In *Bragge v. Stanner*, Palm. 172; s. c. *sub nom. Bragg v. Taund*, New Benl. 89 (1621), there is a *dictum* of Houghton, J., that a feoffment that the feoffee should not alien to A. is good.]

§ 32. In 1561, according to a short note, *Anon.*, Dalison, 58, pl. 5, there was a devise of land to the

testator's widow "to dispose and employ it on herself and on her son at her will and pleasure," and it was held in the Common Pleas, by Dyer, C. J., and Weston & Walsh, JJ., that she took a fee, and not a life estate; and Dyer, C. J., and Walsh, J., held that it was a fee on condition, "so that she could not grant the land to a stranger, but she must hold it or give it over to one of her sons." Whether the point was material, or the validity of the devise questioned, does not appear.

§ 33. In *Daniel v. Uply*, Latch, 9, 39, 134; s. c. *sub nom. Daniel v. Ubley*, Wm. Jones, 137, there was a devise of a house to the testator's widow, "to dispose at her will and pleasure, and to give it to any of my sons which she pleases." She conveyed it to X., one of the testator's sons. It was held by the Court of King's Bench that X. had a good title. Two of the judges thought that the widow took a life estate with power of conveying in fee, and the other two thought that she took a fee simple on condition that she should not alien except to the sons. As the condition was not broken, (even if we agree with the latter two judges that there was a condition,) there was no occasion to question its validity; and nothing is said about it.

§ 34. Serjeant Bridgman, in his argument in *Muschamp v. Bluet*, J. Bridg. 132, 137, contends that a condition upon a devise to the testator's younger sons, that they shall not alien except to their elder brother, is void.¹

§ 35. The question does not seem to have come up for decision until *Doe d. Gill v. Pearson*, 6 East, 173 (1805). In that case there was a devise to two of the testator's

¹ This is not the decision of the court, as stated in 2 Jarm. Wills (5th ed.), 859; but only the contention of the learned Serjeant.

daughters, Ann and Hannah, to hold to them, their heirs and assigns, as tenants in common, "upon this specific proviso and condition, that in case my said daughters, or either of them, shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children." Ann levied a fine of her share. Held, that the testator's heirs could enter for breach of the condition. Lord Ellenborough, in giving judgment, relied on the note in Dalison, 58, and on *Daniel v. Uply*, *ubi supra*. [Cf. §§ 56 c, 56 d, *post*.]

§ 36. In *Attwater v. Attwater*, 18 Beav. 330, there was a devise of land to the testator's nephew, "with an injunction never to sell it out of the family; but, if sold at all, it must be to one of his brothers hereafter named," of whom there were five. Lord Romilly, M. R., declined to follow *Doe v. Pearson*, and held that the clause was simply inoperative.

§ 37. In *Billing v. Welch*, 1 R. 6 C. L. 88, a covenant by the grantee of land that he, his heirs and assigns, would not alien, sell, or assign to any one except his or their child or children, without the license of the grantor, and reserving a penal rent for its breach, was held repugnant to a fee simple, *Attwater v. Attwater* being approved.

§ 38. In *Ludlow v. Bunbury*, 35 Beav. 36, property real and personal, in the hands of trustees, was appointed to A. and his heirs, but upon condition that in case B. or his wife, or any descendant of either of them, should, by any conveyance executed by A., become interested in the property, then the interest of A. should cease. The trustees filed a bill for instructions whether they could safely

convey to A. The Master of the Rolls (Sir John Romilly) ordered a conveyance, holding that the condition was void. There is no opinion, and there was no opposition.

§ 39. *In re Macleay*, L. R. 20 Eq. 186. Here a devise of land to the testator's brother, "on the condition that he never sells it out of the family," was held by Sir George Jessel, M. R., in an elaborate opinion, to be valid.¹ [See *Martin v. Martin*, 19 Ir. L. R. 72, 80. But in *Re Rosher*, 26 Ch. D. 801, 816, Pearson, J., doubted the correctness of the decision of *In re Macleay*. See *Re Dugdale*, 38 Ch. D. 176, 179.]

§ 40. In America it has been often said that a condition not to alien to particular persons is good. *Cowell v. Springs Co.*, 100 U. S. 55, 57. *Jackson v. Schutz*, 18 Johns. 174, 184. *Gray v. Blanchard*, 8 Pick. 284, 289. [*Winsor v. Mills*, 157 Mass. 362, 364. *McWilliams v. Nisly*, 2 S. & R. 507, 513.] *Jaureche v. Proctor*, 48 Pa. 466, 472. [But Chancellor Kent said: "If, however, a restraint upon alienation be confined to an individual named to whom the grant is not to be made, it is said by very high authority (Lit. § 361, Co. Lit. 223) to be a valid condition. But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day." 4 Kent, Com. 131. See *Oxley v. Lane*, 35 N. Y. 340, 347; *Murray v. Green*, 64 Cal. 363, 367, 368. In *Schermerhorn v. Negus*, 1 Denio, 448, a provision in a devise to children and grandchildren that no part of the land devised should be alienated by any of the children or their descendants, except to each other or their descendants, under penalty of forfeiture, was held bad.] In *Anderson v. Cary*, 36

¹ [It should be observed, that there was no argument of opposing counsel.]

Ohio St. 506, and *Gallinger v. Farlinger*, 6 U. C. C. P. 512, prohibitions to alien except to the devisee's brother or brothers were held invalid; but it seems to have been the opinion of the Court in *Pennyman v. McGrogan*, 18 U. C. C. P. 132, that such a condition was good. And see *Smith v. Faught*, 45 U. C. Q. B. 484, 488. In *McCullough v. Gilmore*, 11 Pa. 370, a prohibition not to leave devised land to any but the heirs of the devisee's father's family was held void for uncertainty; and the court said that a condition not to devise except to the grantee's heirs would be bad. [And see *Hartman v. Herbine*, 7 Pa. C. C. 630.] In *Barnard v. Bailey*, 2 Harrington (Del.), 56, it was declared that a condition in a devise that the devisee should not dispose of the property by will to the blood kin of either the testator or the devisee was bad. [In *Williams v. Jones*, 2 Swan, 620, there was a bequest to A. on condition that she should not dispose of it so as to allow either of four persons to get it. It was held that the condition was void.] In *Brothers v. McCurdy*, 36 Pa. 407, a testator directed that land devised to J. should not be sold by him for the purpose of making brick, and especially that he should not sell it to L., and that if J. should offer to sell it contrary to the will, it should go over. L. was during the lifetime of the testator the only brickmaker in the town. J. offered the land to L., and, on his refusal, sold and conveyed it to F. by a deed which recited that it was subject to certain restrictions mentioned in the testator's will. F. used the land for making brick. Held, that the gift over was void for uncertainty. See also *Williams v. Robinson*, 16 Conn. 517; *McKinster v. Smith*, 27 Conn. 628; [*Den d. Blackwell v. Blackwell*, 3 Green, 386, 389, 392;] *Den d.*

Trumbull v. Gibbons, 2 Zab. 117, 154, 155; [*Jamison v. Craven*, 4 Del. Ch. 311, 326. Cf. *Matter of Hohman*, 37 Hun, 250; *Fisher v. Wister*, 154 Pa. 65;] *Bergin v. Sisters of St. Joseph*, 22 U. C. Q. B. 204; [*O'Sullivan v. Phelan*, 17 Ont. 730. See § 56 *f*, *post*.]

§ 41. The authorities, it will be seen, are in hopeless conflict. The rule which naturally suggests itself is that a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but is bad if it allows of alienation only to selected individuals or classes. [Williams on Settlements, 134, 135.] Perhaps this rule might be difficult of application, or easily evaded. At any rate the leading case of *Doe v. Pearson* and the late case of *In re Macleay* cannot be brought within it, for they both allow the power of alienation to be restrained within the narrowest limits; and Sir George Jessel says, "The test is whether the condition takes away the whole power of alienation substantially." L. R. 20 Eq. 189.

§ 42. In England the evil from such provisions is greatly mitigated by applying to them the Rule against Perpetuities, to which conditions as well as conditional limitations are subject. In *In re Macleay*, the provision against alienation was a condition, and Jessel, M. R., said, "Of course, if unlimited as to time, it would be void for remoteness." L. R. 20 Eq. 186, 187, 188, 190. In America this mitigation is to a great extent impossible, for such provisions are generally in the form of conditions, and conditions have been regarded in this country as not subject to the Rule against Perpetuities.¹

¹ There is no reason in the history of the law, or in its principles, why the Rule against Perpetuities should not be applied to conditions. The

§ 43. Assuming that such conditions are to be sustained to some extent, and laying aside the Rule against Perpetuities, there are then two tests:—(1.) The one suggested in § 41, *ante*, that a condition against alienation is bad, if alienation is restricted to particular individuals or a particular class. (2.) That a condition is bad only when all alienation is substantially restricted. The latter test is supported by the weighty authority of Lord Ellenborough and the judges of the King's Bench, as well as of Sir

reason sometimes given for applying it to an executory devise and not to a condition, that the former cannot be released, while the latter can be, is unsound, for an executory devise to A. and his heirs may always be released by A., and yet is unquestionably within the rule.

The practical inconvenience of not applying the rule to conditions is great, especially in America, where all a man's children are his heirs, and where, in a generation after his death, his heirs may be half a hundred or more in number, and scattered all over the continent.

Since the establishment of the rule, there has been, it is believed, not one case in England where a condition exposing to a forfeiture has been sustained when it violated the rule. And there is the statement of Jessel, M. R., quoted in the text, that "of course" a condition might be bad for remoteness. [And see *Dunn v. Flood*, 25 Ch. D. 629.]

There is but one case in America where the court has considered the objection of remoteness to a condition and has rejected it, and that was in the case of the right to a pew, which was held inalienable, and to which, therefore, as in the case of charities, the rule does not apply. *French v. Old South Society*, 106 Mass. 479. See § 29, *ante*. [See now, however, *First Univ. Soc. v. Boland*, 155 Mass. 171, 175, 176.]

But, notwithstanding all this, there have been many cases in America where conditions obnoxious to the Rule against Perpetuities have been sustained; and though they have been upheld without apparently the objection of remoteness occurring to either court or counsel, they now form a body of precedents which it would take some courage to overthrow. And in very many other cases where it has been held that there was no forfeiture, either because there had been no breach or no entry, or because the right had been waived, released, or destroyed, the validity of conditions beyond the period allowed by the Rule against Perpetuities has been declared or assumed as unquestioned, without any objection on the ground of remoteness. [See Gray, Rule against Perpetuities, §§ 299-311.]

George Jessel. But in favor of the former it may be observed: (1.) *Doe v. Pearson* was not decided till 1805, and there was nothing in the earlier authorities which required it to be decided as it was; for from the loose note in Dalison it does not appear whether there was any breach of condition, and in *Daniel v. Uply* there was no breach, and half the judges thought there was no condition. (2.) *In re Macleay* is based largely on *Doe v. Pearson*, [and has been doubted in *Re Rosher*, 26 Ch. D. 801, 816.] (3.) The decision of Lord Romilly in *Attwater v. Attwater* was approved and followed by the Court of Queen's Bench in Ireland in *Billing v. Welch*. (4.) The decisions in America, if not all the *dicta*, disagree with *Doe v. Pearson*. [See *Schermerhorn v. Negus*, 1 Denio, 448;] *Anderson v. Cary*, 36 Ohio St. 506; [*Williams v. Jones*, 2 Swan, 620;] *Gallinger v. Farlinger*, 6 U. C. C. P. 512. (5.) The freedom of conditions in America from the control of the Rule against Perpetuities makes it the more necessary to adopt the stricter rule, as otherwise the alienation of property may be greatly clogged for an indefinite time.

§ 44. In *Ludlow v. Bunbury*, 35 Beav. 36, (see § 38, *ante*.) Lord Romilly is said to have declared that a condition against alienation by a devisee to B. or his descendants was void. This would seem, on any theory, to be going too far, if qualified conditions are to be allowed at all. See 3 Davidson, *Prec. Conv.* (3d ed.) 111, *note*. [But perhaps, in view of this case, of *Williams v. Jones*, 2 Swan, 620, § 40, *ante*, and of the language of Chancellor Kent, cited § 40, *ante*, the wisest way would be to disallow such qualified restrictions altogether. If it is only the immediate grantee who is forbidden to alienate

to specified persons, he can perhaps evade the condition by conveying through a third person.] See Doct. & St., Dial. II. c. 35; [*Anon.*, Dyer, 45 *a* ;] and also Co. Lit. 223 *b* ; *In re Macleay*, L. R. 20 Eq. 186, 189. [No case has yet supported such a condition when imposed on any one beyond the first grantee. See *McKinster v. Smith*, 27 Conn. 628.]

3. *Restraints on Alienation qualified as to Time.*

§ 45. An attempt may be made to impose a condition or conditional limitation against alienation while the interest is (1.) contingent or (2.) vested.

§ 46. (1.) A condition or conditional limitation upon alienation of a contingent interest before it vests, is good. This was first held in *Large's Case*, 2 Leon. 82 ; 3 Leon. 182. There was in that case a devise to the testator's widow, until his son William should reach the age of twenty-two years, and then to others of his sons, upon condition that, if any one of his said sons before William's reaching twenty-two should sell any lands, he should forever lose the same. Under this devise the widow took a freehold, for William might die before he reached twenty-two, and then she would hold for her life ; and the sons took remainders supported by the widow's life estate, but contingent upon William's reaching twenty-two. Before William reached twenty-two, one of the other sons sold his share. It was held that he had forfeited his estate. To the same effect are *Churchill v. Marks*, 1 Coll. 441 ; *Barnett v. Blake*, 2 Dr. & Sm. 117 ; and see *Graham v. Lee*, 23 Beav. 388 ; *Re Payne*, 25 Beav. 556 ; *Samuel v. Samuel*, 12 Ch. D. 152 ; [*Powell v. Boggis*, 35 Beav. 535 ; *Bank of The State v. Forney*, 2

Ired. Eq. 181; *James v. Gard*, 13 Viet. L. R. 908.] As every estate must vest within the time required by the Rule against Perpetuities, no such condition can be bad for remoteness. These decisions are quite in accordance with principle. A vested estate cannot be made terminable by an illegal condition. But if a testator or settlor declares that an estate shall not vest if a certain thing is done, the estate will never vest if the thing is done. If the thing is not done, then the vesting may depend upon whether the omission to do the thing was legal or illegal; but if it is done, the estate will not vest in any case. [See *Powell v. Boggis*, 35 Beav. 535.]

§ 47. (2.) How far is a condition or conditional limitation upon alienation limited in time good, when attached to a vested interest? In the majority of those cases in which a condition or conditional limitation has been held bad, the condition, if broken at all, must have been broken in the lifetime of the first taker.¹ *Ware v. Cann*, 10 B. & C. 433. *Bradley v. Peixoto*, 3 Ves. Jr. 324. [*Willis v. Hiscox*, 4 Myl. & Cr. 197, 201, 202.] *Rishton v. Cobb*, 5 Myl. & Cr. 145. *Re Jones's Will*, 23 L. T. N. S. 211. [*Re Machu*, 21 Ch. D. 838. *Re Dugdale*, 38 Ch. D. 176. *Corbett v. Corbett*, 13 P. D. 136; s. c. 14 P. Div. 7. *Potter v. Couch*, 141 U. S. 296. *Walker v. Vincent*, 19 Pa. 369. *Barker v. Davis*, 12 U. C. C. P. 344. *Lario v. Walker*, 28 Grant, 216. *Re Watson and Woods*, 14 Ont. 48.] In *Renand v. Tourangeau*, L. R. 2 P. C. 4, 18, on appeal from Lower Canada, a restraint upon the

¹ In *Baker v. Newton*, 2 Beav. 112, a devise "to A. for her own absolute use, without liberty to sell or assign during her natural life," was held by Lord Langdale, M. R., to give A. a fee, and not a life estate, but the validity of the restriction does not seem to have been considered.

devises of lands from alienating them for a period of twenty years from the testator's death was held "not valid, either by the old law of France, or the general principles of jurisprudence."

§ 48. On the other hand, in *Kiallmark v. Kiallmark*, 26 L. J. Ch. 1, property, real and personal, was given to trustees to pay an annuity out of the income to A., and the balance to the children of the settlor, and on the death of A. to sell the property and divide the proceeds among said children, provided that, if before such sale any one of the settlor's sons should become bankrupt, his share should go over. One of the sons, after the death of A., but before a sale, became bankrupt. Vice-Chancellor Kindersley held that the gift over took effect. The question discussed was whether the clause of forfeiture was intended to apply to a bankruptcy occurring after the death of A., though before the sale. It was assumed by court and counsel that the clause was good. In this case the property had not been sold, but the children had a vested right in it, and were entitled to the income until sale; and even had it been a reversionary estate, yet, if vested in interest, there would seem to be no valid distinction between it and property vested in possession. The clause against forfeiture in both cases alike is a condition subsequent. See 3 Davidson, Prec. Conv. (3d ed.) 111, *note*; *Mandlebaum v. McDonell*, 29 Mich. 78; § 113, *post*. [In *Powell v. Boggis*, 35 Beav. 535, provisions forfeiting vested reversionary interests upon alienation were held bad.]

§ 49. In *Kearsley v. Woodcock*, 3 Hare, 185, £12,000 were bequeathed to trustees, in trust out of the interest to pay to A. and B. each £150 annually, and during the lives of A. and B., or either, to pay the balance of inter-

est to C. and his executors, administrators, and assigns; and after the death of both A. and B. to stand possessed of £8,000, part of the £12,000, and the interest thereof, in trust for C. and his executors, administrators, and assigns, provided that, if C. during the lives of A. and B., or either, should alienate his interest, it should go over. It was held, or rather assumed, (and by counsel as well as the court,) that the condition was valid. In *Churchill v. Marks*, 1 Coll. 441, 445, the reporter says: "In the course of the argument an eminent conveyancer, in answer to a question put to him by the court, stated his opinion to be, that a gift to A. in fee, with a proviso that, if A. alien in B.'s lifetime, the estate shall shift to B., is valid." In *Pearson v. Dolman*, L. R. 3 Eq. 315, the income of a fund was given to A. until he reached twenty-five, and then the principal was given to him, with a clause of forfeiture on alienation before twenty-five. A. died before twenty-five without having alienated. Vice-Chancellor Wood held that the fund passed to his executors, and said that the clause of forfeiture was good. As A. never alienated, this latter remark was *obiter*. [The Vice-Chancellor does not allude to the restraint on alienation being limited in time. His words are: "Although you cannot make a grant to a man of property, and, at the same time, deprive him of its incidents by saying that he shall not alienate it, yet a gift may be made by a third person, defeasible in the event of an attempt to alien" (p. 320); and he cites *Rochford v. Hackman*, 9 Hare, 475. Expressed in these general terms, the proposition is, of course, unsound. See §§ 13-29 *b*, *ante*. It is a singular piece of undeserved ill-luck that the accurate statement of Turner, V. C., in *Rochford v. Hackman*, that a life estate

could be determined by an alienation, should have been perverted, in three independent cases, into a supposed authority for allowing a fee simple to be so determined, viz. *Pearson v. Dolman*; *Bridge v. Ward*, 35 Wis. 687, § 24, *ante*; *Camp v. Cleary*, 76 Va. 140, § 29 *a*, *ante*. In the report of *Cooper v. Macdonald*, 26 W. R. 377, 379, 380, James, L. J., is said to have remarked *obiter* during the argument, "You may put any restriction you like against alienation of an estate in fee, so long as you do not violate the Rule against Perpetuities." This remark is not given in the other reports of the case. 7 Ch. Div. 288; 47 L. J. N. S. Ch. 373; 38 L. T. 191.]

§ 50. There can be no distinction between restraining alienation of a fee simple during the life of the tenant and during the life of a third person: the decisions in *Kiallmark v. Kiallmark*, and *Kearsley v. Woodcock*, and the off-hand opinion of the "eminent conveyancer" expressed in *Churchill v. Marks*, cannot outweigh the cases cited in § 47, see 3 Davidson, *Prec. Conv.* (3d ed.) 111, *note*: nor can the *dictum* in *Pearson v. Dolman* be considered of as much importance as the contrary remark in *Renaud v. Tourangeau*.

§ 51. [And now in *Re Rosher*, 26 Ch. D. 801, Pearson, J., in an elaborate opinion, has ruled that the notion that a condition against alienating an estate in fee can be made good by limiting it in time, is not law. See a stupid article, 28 Sol. Journ. 559.]

§ 51 *a*. [In *Re Porter*, [1892] 3 Ch. 481, a testator gave the residue of his estate to trustees, in trust to pay the income to his two sisters during their lives, and after the death of one to the survivor, and on her death to divide the principal among their children, payable at

twenty-one, the share of any child dying before twenty-one to go over, and he declared that in case any of his sisters' children should, during the lives of his sisters or the survivor, assign or attempt to assign its expectant share, such share should be forfeited and go over. A., one of the children, reached twenty-one and attempted to assign her share. North, J., held that A.'s share was forfeited. A.'s counsel distinguished *Churchill v. Marks*, on the ground that in that case the interest forfeited was contingent. North, J., however, said: "I cannot see that there is any distinction in principle between a contingent share and a share which is vested but liable to be divested. I quite understand the difference between the two; but I do not see any principle upon which I can say that the clause of forfeiture in the present will cannot legally apply to a vested share subject to divesting, although it would apply to a contingent share." But in the first place, a provision for forfeiture attached to a contingent estate is a condition precedent, while when attached to an estate vested, although subject to be divested, it is a condition subsequent, and the distinction between conditions precedent and subsequent is vital. See § 46, *ante*. In the second place, in *Re Porter*, the interests vested in the sisters' children became indefeasible when they reached twenty-one, so that the real matter before the court was the effect of a provision for forfeiture attached to an interest indefeasibly vested though not yet come into possession. That such a provision is valid is a proposition involved in the decision of *Re Porter*; but in view of North, J.'s language, it is doubtful if he meant to lay it down, and if he did, it must be deemed, it is submitted, unsound.]

§ 52. The actual state of the law in the United States is as follows. It has often been said that a condition against alienation confined to a limited period is good; but such remarks have been *obiter dicta*, without any reasoning or citation of authorities. *Cowell v. Springs Co.*, 100 U. S. 55, 57. *Jackson v. Schutz*, 18 Johns. 174, 184. *Blackstone Bank v. Davis*, 21 Pick. 42. *Simonds v. Simonds*, 3 Met. 558, 562. *Andrews v. Spurlin*, 35 Ind. 262, 268. [*Munroe v. Hall*, 97 N. C. 206, 210.] *Janretche v. Proctor*, 48 Pa. 466, 472. *Sanford v. Lackland*, 2 Dill. 6, 10. So, if confined to a "reasonable limited period." *Gray v. Blanchard*, 8 Pick. 284, 289. See [*Camp v. Cleary*, 76 Va. 140, 143,] 9 Am. Law Reg. N. S. 458, 461-463. The case most generally cited in favor of the validity of a limited restraint is *M'Williams v. Nisly*, 2 S. & R. 507, 513, in which is to be found a *dictum* of Tilghman, C. J., that a limited restraint is good, supported by a reference to *Large's Case*, 2 Leon. 82; 3 Leon. 182. The Chief Justice says: "For what length of time this general restriction may endure, it is not necessary to decide, nor shall I attempt to trace the boundary. Suffice it to say, and I think it may be said with great safety, that it may last during the life of any person in existence at the time of making the deed."

§ 53. The cases in which such conditions have been sustained are:—(1.) *Stewart v. Brady*, 3 Bush, 623. (See *Stewart v. Barrow*, 7 Bush, 368.) Here, in an opinion without any citation of cases, a condition attached to a devise in fee, that the devisee should not sell till he was thirty-five years of age, was held good. (2.) *Dougal v. Fryer*, 3 Mo. 40. (See *Collins v. Clamorgan*, 5 Mo. 272; 6 Mo. 169; and *Clamorgan v. Lane*, 9 Mo. 442.)

In this case, in an opinion equally barren of authorities, a condition not to alien before the age of twenty-five was held good. [In this case the deed containing the condition was made when the Spanish law was in force, and by that law twenty-five was the age of majority. See 3 Mo. 43.] (3.) *Earls v. M'Alpine*, 27 Grant, 161; s. c. 6 Ont. Ap. 145. Devise to two sons on condition that they did not alien the land during the life of their mother without her consent. The condition was held good; (see *Armstrong v. M'Alpine*, 4 Ont. App. 250). [The words of the will were simply, "I will that my sons," etc. The judges found great difficulty in construing this into a condition; it is surprising that they felt able to do so; see *Heddlestone v. Heddlestone*, 15 Ont. 280.] See also *Pennyman v. McGrogan*, 18 U. C. C. P. 132. In *Smith v. Faught*, 45 U. C. Q. B. 484, [there was a direction in a will that a devisee should not sell during her lifetime, but might devise to any of her children. The court thought this restriction good, but that a mortgage, not being a sale, was not within it. In *Re Winstanley*, 6 Ont. 315, there was the like restriction except that the devise might be to any one; and it was held to be valid. (4.) In *Re Northcote*, 18 Ont. 107, there was a devise on an express condition that the devisee should not sell or mortgage during his life, but might devise to his children, and this condition was held good. See § 55, *post*. (5.) *Re Weller*, 16 Ont. 318. A devise to A. with a proviso that she should not sell until her sister was forty years old was held good; and see to the same effect *Meyers v. Hamilton Provident Co.*, 19 Ont. 358.] In *Langdon v. Ingram*, 28 Ind. 360, a restraint against alienation during minority was held good, and consequently a guardian of the minor was not allowed to convey.

§ 54. The reasoned authority is against the validity of such conditions. (1.) A conditional limitation upon a devisee's selling before he reached thirty-five was held bad in *Twitty v. Camp*, Phil. Eq. (N. C.) 61. (2.) A condition not to sell until the youngest of two devisees reached thirty-one was held bad in *Anderson v. Cary*, 36 Ohio St. 506. [(3.) *Potter v. Couch*, 141 U. S. 296. Here was a devise to trustees to hold for twenty years, and then to convey to certain persons with a conditional limitation over in case any of those persons had ceased to be personally interested in the devise. This conditional limitation was held void.] In *Mandlebaum v. McDonell*, 29 Mich. 78, the court thought there was neither condition nor conditional limitation, but only a restriction on alienation within a limited time; but the opinion of Christiancy, J., holding the restriction bad, is the fullest argument against the validity of such conditions and conditional limitations to be found in the books. [This case was followed by *Bennett v. Chapin*, 77 Mich. 526.] A restriction on the alienation of a fee simple limited in time was also held void in *Roosevelt v. Thurman*, 1 Johns. Ch. 220; [and in other cases the restriction against alienation was imposed on the first devisee only, and yet it was held void. *Kepple's App.*, 53 Pa. 211. *Heddlestone v. Heddlestone*, 15 Ont. 280. *Pritchard v. Bailey*, 113 N. C. 521. See *Murray v. Green*, 64 Cal. 363, 368. Since the full discussion and the decision in *Mandlebaum v. McDonell*, followed and approved by *Re Rosher*, and *Potter v. Couch*, it is probably safe to say that the invalidity of restrictions against alienation of fees simple, though limited in time, is now established, except in the Province of Ontario.] For cases in which restrictions limited in time existed, but where their validity

was not discussed by the court, see *Holingshed v. Alston*, 13 Ga. 277; *Voris v. Renshaw*, 49 Ill. 425; *Lane v. Lane*, 8 All. 350; *Hauer v. Sheetz*, 3 Yeates, 205; s. c. 2 Binn. 532, 546; *Stones v. Mauey*, 3 Tenn. Ch. 731; *Hill v. Hill*, 4 Barb. 419; *Armstrong v. M'Alpine*, 4 Ont. App. 250. [See *Collins v. Foley*, 63 Md. 158. On the effect which the recognition of spendthrift trusts may have on this doctrine, see §§ 124 a - 124 p, *post.*]

4. *Restraints on Alienation qualified as to Manner.*

§ 55. A condition or conditional limitation aimed against any particular mode of alienation is as bad as if directed against alienation generally. Thus, a gift over upon tenant in fee mortgaging, levying a fine, or suffering a recovery, is bad. *Ware v. Cann*, 10 B. & C. 433. So a gift over on the charging of the fee with an annuity is bad (the gift over was also bad for remoteness). *Willis v. Hiscox*, 4 Myl. & C. 197, 201, 202. So a direction not to alien, except to exchange or reinvest, was held void; but here there was no condition or gift over. *Hood v. Oglander*, 34 Beav. 513. 2 Jarm. Wills (5th ed.), 855. But Sir George Jessel, M. R., said in *Re Macleay*, L. R. 20 Eq. 186, 189, "You may restrict alienation by prohibiting a particular class of alienation. . . . This condition is limited. It is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle." The Master of the Rolls held the condition good also on another ground. See § 39, *ante*. Following Sir George Jessel, it was held in *Smith v. Faught*, 45 U. C. Q. B. 484, that a condition

that a devisee should not sell, but might grant to his children, was valid, but was not broken by the devisee's mortgaging [and this was followed by *Meyers v. Hamilton Provident & Loan Co.*, 19 Ont. 358. In *Re Winstanley*, 6 Ont. 315, this doctrine was applied to support a conditional limitation over on a devisee's disposing of an estate except by will, on the ground that, as a will was one mode of alienation, there was not an absolute prohibition to alienate, and this was followed in *Re Northcote*, 18 Ont. 107; but such a theory is inconsistent with the cases in which conditions against alienation confined to the lifetime of the first grantee have been held invalid. In most of the cases cited, § 47, *ante*, the devisees or grantees were not prohibited by the conditions from disposing of the property by will, and yet the conditions were held bad; and see *Martin v. Martin*, 19 Ir. L. R. 72; *O'Callaghan v. Swan*, 13 Vict. L. R. 676. In *Re Rosher*, 26 Ch. D. 801, Pearson, J., dissented strenuously from the Master of the Rolls, and the obvious ease of evading such a condition, if allowed to exist, renders it doubtful whether Sir George Jessel will have a following in this matter, beyond what he already has in the Province of Ontario.]

§ 56. As a will is one of the modes of alienating property, a provision that a fee simple, or that personal property held absolutely, shall go over unless the grantee disposes of it in his lifetime, is void, for such a provision undertakes to limit the modes in which an alienation may take place, and makes the gift over fail or take effect accordingly as the alienation is by deed or by will. Of course the fact that the grantee has no power to dispose of the property by will is a strong indication that he takes merely a life estate, with a power of appointment; but

assuming it to be clear that he takes the fee or absolute interest, then the limitation over is void. *Henderson v. Cross*, 29 Beav. 216. *Perry v. Merritt*, L. R. 18 Eq. 152.¹ [*Bowes v. Goslett*, 27 L. J. N. S. Ch. 249.]

§ 56 *a*. [In many cases in the United States gifts over of fee simple estates or absolute interests in case the tenant or owner does not convey in his lifetime have been held void. *Flinn v. Davis*, 18 Ala. 132. *McKenzie's Appeal*, 41 Conn. 607. *Outland v. Bowen*, 115 Ind. 150. *Rona v. Meier*, 47 Iowa, 607. *Case v. Divire*, 60 Iowa, 442. *Alden v. Johnson*, 63 Iowa, 124. *Re Will of Burbank*, 69 Iowa, 373. *Halliday v. Stickler*, 78 Iowa, 388. *Bills v. Bills*, 80 Iowa, 269. *Jones v. Bacon*, 68 Me. 34. *Kelley v. Meins*, 135 Mass. 231. *Joslin v. Rhoades*, 150 Mass. 301. *Amin v. Vandoren*, 1 McCart. 135. *McDonald v. Waldgrove*, 1 Sandf. Ch. 274. *McLeans v. Macdonald*, 2 Edm. 393. *Campbell v. Beaumont*, 91 N. Y. 464. *Van Horne v. Campbell*, 100 N. Y. 287. *Newland v. Newland*, 1 Jones, 463. *Clark v. Hardwick Seminary*, 3 Ohio, C. C. 152. *Davis v. Richardson*, 10 Yerg. 290. *Bean v. Myers*, 1 Coldw. 226. *Riddick v. Cohoon*, 4 Rand. 547. *Melson v. Doe*, 4 Leigh, 403. *May v. Joynes*, 20 Grat. 692. *Cole v. Cole*, 79 Va. 251. *Hall v. Palmer*, 87 Va. 354. *Bowen v. Bowen*, Id. 438. See also *Pellizzarro v. Reppert*, 83 Iowa, 497; *Ramsdell v. Ramsdell*, 21 Me. 288; *Pickering v. Langdon*, 22 Me. 413; *Mitchell v. Morse*, 77 Me. 423; *Merrill v. Emery*, 10 Pick. 507; *Perry v. Cross*, 132 Mass. 454; *Jones v. Jones*, 25 Mich. 401; *Wead v. Gray*, 78 Mo. 59; *McClellan v. Larchar*, 45

¹ [In many cases the gift over is got rid of by holding the words used too uncertain to create a trust. See the cases collected, 1 Jarm. Wills (5th ed.), 333. Cf. also *Mills v. Newberry*, 112 Ill. 123.]

N. J. Eq. 17; *Helmer v. Shoemaker*, 22 Wend. 137; *Smith v. Bell*, Mart. & Y. 302; *Stowell v. Hastings*, 59 Vt. 494; *Elcan v. Lancasterian School*, 2 Pat. & H. 53; *Carr v. Effinger*, 78 Va. 197. Cf. *Wortman v. Robinson*, 44 Hun, 357, *contra*; and also *Banfield v. Wiggin*, 58 N. H. 155; *Chase v. Currier*, 63 N. H. 90.]

§ 56 *b*. [In few, if any, of these cases, however, is the invalidity of the gift over attributed to its being a restraint on alienation by will. The cases are based by the courts on the ground (discussed in §§ 57-74 *g*, *post*) that a gift over upon the failure to alienate a fee in any way is bad. Indeed, in the cases cited in the two preceding sections as deciding that a gift over upon failure to convey during life is bad, it was an heir or administrator, more frequently than a devisee or executor, whose right was maintained against a gift over.]

§ 56 *c*. In *Doe d. Stevenson v. Glover*, 1 C. B. 448, there was a devise to A. and his heirs, but if A. died without issue living at his death, and had not disposed of his interest in his lifetime, then over to B., and the gift over was held good. Turner, L. J., in *Holmes v. Godson*, 8 DeG. M. & G. 152, 166, disapproved this case, and remarked that neither court nor counsel seemed to have observed that to hold the devise over good was to restrain the tenant in fee from making a will of his lands while allowing him to convey by deed. [But the case may be supported on the ground that there was a restraint on making a will, not absolute, but only upon the contingency that A. died without leaving issue at his death. If there had been a simple gift over in case A. had died without issue him surviving, such gift over would have been good, and it does not seem as if such good gift would be ren-

dered bad by being limited in its generality and confined to those cases where A. had made no alienation in his lifetime. Turner, L. J.'s real objection to *Doe d. Stevenson v. Glover* was that it was inconsistent with the doctrine laid down in *Holmes v. Godson*, §§ 61-64, *post*.]

§ 56 *d*. [The case of *Hall v. Robinson*, 3 Jones Eq. 348, was decided on the ground above suggested as the true reason for *Doe v. Glover*. Personal property was bequeathed to T., but if he died under age, or if he died of full age but intestate and without issue, then to H. The gift to H. was held good. The court say: "The only difference between the present case and the ordinary cases of conditional limitations and executory devises and bequests is that, here, the future contingent estate is made to depend not only upon the event of the death of the taker of the determinable fee under age, and if of age without leaving issue, but upon the additional event of his dying intestate, so as to make three, instead of one or two, contingencies." So in *Fogarty v. Stack*, 86 Tenn. 610, land was conveyed by a man to his wife in fee to her separate use, with power by deed executed jointly with her husband to convey the land and hold the proceeds on the same use, provided that if the husband survived the land should revert to him. This last provision was held good. And again in *Randolph v. Wright*, 81 Va. 608, land was devised two thirds to A. and his heirs, and one third to B. and his heirs, but should either die without lawful issue (which under the Virginia statute meant a definite failure of issue) or without a will, then his share to go to the survivor. A. died without issue and intestate. It was *held* that the gift over was good. And see to the same effect *Friedman v. Steiner*, 107 Ill. 125. But

Karker's Appeal, 60 Pa. 141, § 71, *post*, and *Fisher v. Wister*, 154 Pa. 65, § 71 *a*, *post*, are *contra*.]

§ 56 *e*. [It is to be observed that in none of the cases cited in the preceding section was the devisee given any right of disposal in his lifetime overriding the executory gift; and, as might be anticipated from the grounds on which the courts have placed the cases cited in § 56 *a*, gifts over upon the tenant in fee or absolute owner not conveying in his lifetime and dying without leaving children or issue at his death have been held bad in *Ellin v. Davis*, 18 Ala. 132; *Outland v. Bowen*, 115 Ind. 150; *Kelley v. Meins*, 135 Mass. 231; *Annin v. Vandoren*, 1 McCart. 135; *Jackson v. Bull*, 10 Johns. 19; *Van Horne v. Campbell*, 100 N. Y. 287; *Riddick v. Cohoon*, 4 Rand. 547; *Melson v. Doe*, 4 Leigh, 408. So gifts over upon a devisee dying without leaving issue at his death, and without having disposed either in his lifetime or by will, of the property devised, was held void in *Combs v. Combs*, 67 Md. 11. So *Armstrong v. Kent*, 1 Zab. 509. Cf. *Eaton v. Straw*, 18 N. H. 320; *O'Callaghan v. Swan*, 13 Vict. L. R. 676; and see 2 Lead. Cas. in Amer. L. of Real Prop. 482, 483; 32 Am. L. Reg. N. S. 1044, 1045.]

§ 56 *f*. [If a tenant in fee or owner of personal property has power of disposition in his lifetime, but is restrained from devising or bequeathing to particular persons, or is directed to devise or bequeath to particular persons, such restraint or direction is void in like manner as a general restraint. *Newland v. Newland*, 1 Jones, 463. *Good v. Fichthorn*, 144 Pa. 287. See *Matter of Hohman*, 37 Hun, 250. But cf. *McMurry v. Stanley*, 69 Tex. 227; and see also *Mills v. Newberry*, 112 Ill. 123.]

§ 56 *g*. [The New York Revised Statutes, Part 2, c. 1, tit. 2, art. 1, § 32, p. 725, provides that "No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate, by disseisin, forfeiture, surrender, merger, or otherwise." The revisers doubtless were thinking of cases on the destruction of contingent remainders, and there is no reason to suppose they had in mind such limitations as are here discussed. But the lower courts of New York have held that, under the Revised Statutes, upon an estate in fee a gift over of what the devisee has not conveyed in his lifetime is good. *Greyston v. Clark*, 41 Hun, 125. *Simpson v. French*, 6 Demarest, 108. *Leggett v. Firth*, 53 Hun, 152. *Baumgras v. Baumgras*, 5 Delehanty, 8. In *Griswold v. Warner*, 51 Hun, 12, however, such a gift was held bad; and no suggestion was made by the court as to any change being wrought by the Revised Statutes. The point does not seem to have been passed upon by the Court of Appeals. Cf. *Leggett v. Firth*, 132 N. Y. 7.]

5. *Gifts over upon Intestacy.*

§ 57. It has been often said and held that a devise to A. in fee, but if A. dies without having disposed of the land by deed or will, then over to B., is bad. It is not at first easy to say why this should be so; the owner of the land has full power of alienation, either by deed or will. It rests indeed with him to say whether the gift over shall take effect, but that is the case with many executory devises. A devise may be made to A. with a gift over, unless at his death he has been married, or has been called to

the bar, or has gone to Rome, or has given \$100 to B.; and no one will question that the gift over is good, although it may rest entirely within A.'s control whether the event which is to prevent the gift over shall take place or not. What illegality is there in an executory devise depending on A.'s not making a deed or will, if he has the power of making one should he so wish?

§ 58. A gift over of what is left undisposed of by the first taker, either in his lifetime or by his will, was early considered in the cases where the gift was of a sum of money or of a residue. Such gifts were held bad, and for a good reason,—for uncertainty, and the difficulty, if not impossibility, of determining the subject matter of the gift over. That was the reason which was given in the first cases. *Lightburne v. Gill*, 3 B. P. C. (Toml. ed.) 250 (1764). The intention “must fail on account of its uncertainty.” *Per* Sir William Grant, M. R., *Bull v. Kingston*, 1 Mer. 314 (1816). The doctrine in such cases is now well settled. *Ross v. Ross*, 1 Jac. & W. 154. *Cuthbert v. Purrier*, Jac. 415. [*Brown v. Gibbs*, 1 R. & Myl. 614.] *Phillips v. Eastwood*, Lloyd & G. temp. Sugd. 270, 297, 298. *Green v. Harvey*, 1 Hare, 428. “It is a rule that, where a money fund is given to a person absolutely, a condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person. Apart from any supposed incongruity, a notion which savors of metaphysical refinement rather than of anything substantial, one reason which may be assigned in support of the expediency of this rule is, that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not; since, if the person to whom the absolute interest

is given left any personalty, it might be wholly uncertain whether it were part of the precise fund which was the subject of the condition or not. Another reason may be, that it would be contrary to the well-being of the party absolutely entitled to lead him profusely to spend all that was given him, which in many cases might be all that he had in the world." *Per* Lord Truro, C., *Watkins v. Williams*, 3 Macn. & G. 622, 629. *Re Yalden*, 1 DeG. M. & G. 53. *Re Mortlock's Trust*, 3 K. & J. 456. *Barton v. Barton*, Id. 512. *Weale v. Ollive*, 32 Beav. 421. *In re Wilcocks' Settlement*, 1 Ch. D. 221. [1 Jarm. Wills (5th ed.), 333. See *Bowes v. Goslett*, 27 L. J. N. S. Ch. 249; *Henderson v. Cross*, 20 Beav. 216; *Perry v. Merritt*, L. R. 18 Eq. 152; 32 Am. L. Reg. N. S. 1037.] (*Upwell v. Halsey*, 1 P. Wms. 651, must be deemed overruled. See § 65 *a*, *post*.)

§ 59. This objection of uncertainty does not, however, apply to real estate, and if a devise over of land upon the intestacy of the first taker is to be deemed bad, some other reason must be found for the conclusion. In *Guliver v. Vaux*, decided in the Common Pleas in 1746, not reported in the contemporary reports, but printed from the MSS. of Mr. Justice Burnett, 8 DeG. M. & G. 167, it was held that a gift over upon the death of the testator's children (to whom the estate was given) without leaving issue, and without appointing the disposal of the same, was bad. Burnett, J., said (p. 172): "What is the condition here? That if Thomas [the testator's son] dies without issue his heirs shall not take by descent, but by appointment, whereas a devise to a man's heir at law, or grant to heirs, is void, and he will take by descent. *Counden v. Clerke*, Hob. 29. In this case, therefore, a devise in fee, upon the

condition that his heirs shall not take by descent, unless he specially appoint them, is a void condition, and consequently the devise subsisting on that condition is void." The argument is, that, as a man cannot devise property to his heirs, they must take by descent; that, if they cannot take by descent, they cannot take at all; and that a man would be precluded by this condition from allowing his fee-simple estate to go to his heirs, because any attempt to devise it to them would be inefficacious. If Thomas should devise the land to his heirs, there would be no devise at all, he would not have disposed of the land, and (if he left no issue) the gift over would take effect. Thus Thomas would have a fee simple, and yet it could by no possibility go to his heirs. This reasoning would hardly find acceptance at the present day, and a devise to a man's heirs, although they took by descent, would be a sufficient disposal to prevent the gift over taking effect. But it must be observed that this reasoning, narrow as it is, is the reasoning on which *Gulliver v. Vaux* goes. [See 32 Am. L. Reg. N. S. 1036.]

§ 60. In *Doe d. Stevenson v. Glover*, 1 C. B. 448, there was a devise to A. and his heirs; but if A. should die without issue then living, and should not have disposed of his interest in his lifetime, then to B. It was held that the gift over was good. *Gulliver v. Vaux* was not cited, and was doubtless not known. It is to be observed, as noticed, (§ 56 *c*, *ante*), that in this case alienation by will was restrained, if A. died without issue then living.

§ 61. In *Holmes v. Godson*, 8 DeG. M. & G. 152, a testator gave real and personal estate in trust for A., to vest in him at twenty-one; but if he should die under twenty-one, or having attained twenty-one should not

have made a will, then over. Knight Bruce and Turner, L. JJ., held that the property vested in A. absolutely at twenty-one, and that the gift over was void. The Lord Justice Turner gave the reasons for the decision thus (pp. 159, 160): "The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this disposition tends strictly to contravene the law, and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad." For authority he mainly relies on *Gulliver v. Vauv.* [The decision of *Holmes v. Godson* did not call for the laying down of any such doctrine. The effect of the language in that case was that no alienation made by A. in his lifetime was valid, unless he left a will. That practically prevented his selling the estate; for the purchaser would lose the land if A. should die intestate, a matter which was in the sole control of A. It might therefore have been well held that the gift over in that case was void, without establishing the doctrine laid down by the court.]

§ 62. *Holmes v. Godson* is a very deliberate and careful judgment. It has been followed, and the principle upon which it purports to go has been approved in Chancery, and given as the reason for holding to be bad gifts over of "what remains" of personalty, instead of the "uncertainty" which the earlier cases alleged to be the ground for the invalidity of these gifts. *Barton v. Barton*, 3 K. & J. 512. *Bowes v. Goslett*, 27 L. J. N. S. Ch. 249. *Wilcocks' Settlement*, 1 Ch. D. 229. [*Stretton v. Fitzgerald*, 23 Ir. L. R. 310, 466. And see *Welsh v. Woodbury*, 144 Mass. 542.] And it is treated as settled law in the modern

text-books, e. g. Theob. Wills (3d ed.), 427, and as having overruled *Doe d. Stevenson v. Glover*. 2 Jarm. Wills (5th ed.), 856, *note (d)*. [See 32 Am. L. Reg. N. S. 1038.] Such a limitation over is bad in the case of a gift of money, or of a residue, and it is desirable to have a uniform rule for all kinds of property.

§ 63. On the other hand, *Doe v. Glover* is a distinct authority that land devised in fee may be given over if not disposed of by the grantee; and this decision, although departed from in the Chancery, has never been overruled at common law, and *Gulliver v. Vaux* rests on the narrow ground stated. [It should be observed also that in *Holmes v. Godson*, conveyance *inter vivos* was practically restrained, as above noted, and that this was so too in *Barton v. Barton*, which seems to be the only English case on this point since *Holmes v. Godson*, in which real estate is concerned. That is, it has never been actually held in England that if land is devised in fee with a gift over in case the devisee does not dispose of it in his lifetime or by his will, the gift over is bad. In Ireland such a gift was held bad in *Stretton v. Fitzgerald*, *ubi supra*.] Any distinction between real and personal property is treated as irrational by Turner, L. J., in *Holmes v. Godson*, 8 DeG. M. & G. 152, 160, 161, and by Fry, J., in *Shaw v. Ford*, 7 Ch. D. 669, 674; but the ground on which originally such limitations upon gifts of personalty were held good (namely, the difficulty of identifying the undisposed of balance) does not exist in realty. And upon principle, (as has been said, § 57, *ante*,) there seems no difference between the contingency of not making a deed or will and any other contingency. Fry, J., in *Shaw v. Ford*, *ubi supra*, while asserting that the law is settled

by *Holmes v. Godson*, declines "to inquire into the logical sufficiency of the reason given." The most formal statement of a reason for any difference is given by Fry, J., in this case (p. 673): "*Prima facie*, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of these exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate, and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Gulliver v. Vaux*, *Holmes v. Godson*, and *Ware v. Camm*." Obviously the reason does not commend itself to the learned judge, aside from the authority of those who have announced it. But apart from this there is no such exception as he lays down. Suppose an estate in fee simple is given to A., but if he dies without issue living at his death, then over to B. Here we have an executory devise unquestionably good, yet it defeats an estate in fee "by altering the course of its devolution," and it takes effect "at the moment of devolution and at no other time." In fact, most executory devises take effect at the death of the first taker,—that is, "at the moment of devolution and at no other time." This "supposed incongruity" of a gift over on intestacy is, to use the words of Lord Truro,

(cited § 58, *ante*,) "a notion which savors of metaphysical refinement rather than of anything substantial."

§ 64. Mr. Justice Fry, in this same case of *Shaw v. Ford*, gives another reason for declaring gifts on intestacy bad; and if the doctrine is to be upheld, this is undoubtedly the least irrational ground on which it can be put. "Any executory devise," he says (p. 674), "which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void." Of this a devise over upon alienation is an instance, and so also is a devise upon not alienating, for the right to enjoy without alienation is as much an incident to the estate as the right to alienate; and on this ground he decided that, where land was devised to several as tenants in common, with a proviso that, if one died before partition, his share should go over, the gift over was void, because the right of tenants in common to hold their interests undivided is an incident of the estate. See [32 Am. L. Reg. N. S. 1038,] § 30, *ante*.¹

§ 65. In America a gift over of personalty, if the first taker does not dispose of it in his lifetime or by will, is bad. [*Allen v. White*, 16 Ala. 181. *Foster v. Smith*, 156 Mass. 379. *Armstrong v. Kent*, 1 Zab. 509. *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21.] *Smith v. Bell*, Mart. & Yerg. 302. *Sevièr v. Brown*, 2 Swan, 112. See *Smith v. Bell*,

¹ It has been held, that where there is a gift by will to A., but, if he does not dispose of it, then at his death to B., B. will not take, though A. dies before the testator. *Hughes v. Ellis*, 20 Beav. 193. *Grated v. Grated*, 26 Beav. 621. But these cases are questioned, with good reason, in *Stringer's Estate*, 6 Ch. Div. 1; and *Burbank v. Whitney*, 24 Pick. 146 [and *Crozier v. Bray*, 39 Hun, 121, are] *contra*. [See also *Eaton v. Straw*, 18 N. H. 320, 333; *Odell v. Odell*, 10 All. 1, 7. But cf. 2 Jarm. Wills (5th ed.), 856.]

6 Pet. 68. [These cases are not placed on the uncertainty or difficulty of tracing personal property, but on the grounds upon which, as shown in the following sections, cases concerning real estate are generally dealt with in the United States, and upon which also the cases cited, § 56 *u et seqq.*, restraining the power of disposition by will are put. Many of these latter cases concern personalty either alone or in connection with realty. E. g. *Flinn v. Davis*; *McKenzie's Appeal*; *Re Will of Burbank*; *Bills v. Bills*; *Jones v. Bacon*; *Joslin v. Rhoades*; *Annin v. Vundoren*; *Campbell v. Beutmont*; *Newland v. Newland*; *Clark v. Hurdwick Seminary*; *Davis v. Richardson*; *Bean v. Meyers*; *Riddick v. Cohoon*; *May v. Jones*; *Cole v. Cole*; *Bowen v. Bowen*; *Merrill v. Emery*; *Jones v. Jones*; *Stowell v. Hastings*; *Elcan v. Lancastrian School*; *Curr v. Effinger*; *Wortman v. Robinson*; *Hall v. Robinson*; *Matter of Hohman*; *Mills v. Newberry*; *Simpson v. French*; *Griswold v. Warner*.]

§ 65 *a*. [In *Cox v. Wills*, 49 N. J. Eq. 130, a testator gave a legacy to his wife, believing that she would distribute by will among his near relatives so much of the legacy as she might not use for comfortable maintenance. Pitney, V. C., held that the wife had not a general power of disposition, but power to dispose of only so much as might be needed for her comfortable maintenance. It may be difficult to support this case on any theory. It finds, indeed, some support in *Upwell v. Halsey*, 1 P. Wms. 651, where personal property was bequeathed to a wife, with a direction that what she should leave of her subsistence should go to the testator's sister, and in which it was held that the wife could take only what was necessary for her subsistence, and that what was not so taken

went to the sister. But of this last case Lord Loughborough, C., said in *Malim v. Keighley*, 2 Ves. Jr. 529, 532 : "Perhaps the determination may be very much doubted ;" and Sir E. B. Sugden, C., in *Phillips v. Eastwood*, 11. & G. temp. Sugd. 270, 298 : "That case is, I think, overruled."

§ 66. We have seen that in the English Chancery a gift over after a devise of realty in case anything should remain at the devisee's death, and he should die intestate, has been held bad, either on the ground that the law insists that the real estate of a man dying intestate must go to his heirs, or on the somewhat more satisfactory ground suggested by Fry, J., in *Shaw v. Ford*, that the right to enjoy without alienation is a necessary incident of an estate in fee simple. In America the same result has generally been reached, but in a different way ; viz. on the supposed authority of a case in Fitzgibbon, and on a theory invented, it would seem, by Chancellor Kent.

§ 67. The first case in the United States was *Idle v. Idle*, 5 Mass. 500. This was a gift by will of realty and personalty to the testator's son, P., and his heirs ; but if P. should die and leave no heirs, then what estate he should leave was to go to the testator's son J. and his grandson N. On a writ of entry by N., the court (Parsons, C. J., delivering the opinion) held that P. took a fee simple and not a fee tail, although the word "heirs" in the phrase "leave no heirs" meant heirs of the body ; and that the gift over was void, on the ground that "whenever it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose

of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift."

§ 68. The decision in *Idle v. Idle* purports to be based on *Attorney-General v. Hall*, Fitzg. 314 (1731), in Chancery before Lord King, C., Jekyll, M. R., and Reynolds, C. B.; reported also in W. Kel. 13, and in 2 Eq. Cas. Ab. 293, pl. 21. That case was shortly this. A testator gave realty and personalty to A. and the heirs of his body, and if A. should die, leaving no heirs of his body living, then so much of the realty and personalty as A. should be possessed of at his death to a charity. A. suffered a recovery of the realty, and died without issue. The charity sought an account of the realty and personalty. It was held that A. was tenant in tail of the realty, and the charity therefore was barred by the recovery. As to the personalty, the defendant, who was the executrix, relied on the distinction (now fully exploded) between the devise of a chattel, after which, it was said, there could be no limitation, and of the use of a chattel, after which a limitation was possible. The court adopted this distinction. According to Fitzgibbon, they were "unanimous that the limitation over was void, as the absolute ownership had been given to" A., "for it is to him and the heirs of his body, and the Company are to have no more than he shall have left unspent; and therefore he had a power to dispose of the whole, which power was not expressly given to him, but it resulted from his interest. The words that give an estate-tail in the land must transfer the entire property of the personal estate, and then nothing remains to be given over." The ground of decision is brought out more clearly in Wm. Kelyng (with which accords 2 Eq. Cas. Ab. in

marg.): "In regard the ownership and property of the personal estate was vested in" A., "and not the use only; this was held to be a void limitation to the" charity. "It is giving a man a sum of money to spend, and limiting over to another what does not happen to be spent." To which the reporter adds: "And so note a difference between a devise of chattels real and personal;" i. e. while an executory limitation of a term for years was good, a like limitation of chattels personal was not. See *Flanders v. Clark*, 1 Ves. Sr. 9; 2 Fearn, C. R. (4th ed.) 225, note (a) by Powell. The case goes distinctly on the ground, that the property in question was chattels personal; that there was a difference (on which no one would rely at the present day) between the bequest of a chattel and of its use; and that after the gift of a chattel personal there could be no executory bequest of any sort. The kind of executory bequest did not determine the decision. The case forms no support for *Ide v. Ide*, and yet that case cites no other authority. [See 32 Am. L. Reg. N. S. 1039-1041.]

§ 69. The doctrine next appears four years later, in New York, in *Jackson v. Bull*, 10 Johns. 19. There land was devised to A. and his heirs, but in case A. died without issue, the property he died possessed of was to go to B. The Supreme Court of New York, following *Ide v. Ide*, and professing to rest on *Attorney-General v. Hall*, held, in a *per curiam* opinion, that the gift over was void. They said, "A valid executory devise of real or personal estate cannot be defeated at the will and pleasure of the first taker. This is a settled principle." And therefore, as the first taker could by conveyance defeat the devise over, such devise over was invalid. There may have been an objec-

tion to this devise, as it made the gift over depend on the mode of alienation [see, however, §§ 55 c-56 c, *ante*]; but the notion that an executory devise could not be made dependent on an act of the first taker was a singular fallacy. When the books and judges had said that the first taker could not defeat an executory devise, what they meant was that no act of the first taker could prevent the contingent event designated from being followed by the vesting of the executory devise; but they never meant that the executory devise was bad because the happening of the contingent event itself was in the control of the first taker. No such idea had ever been suggested before; on the contrary, in *Beauchcroft v. Broome*, 4 T. R. 441, where a devise was to A. and his heirs, and if he died without having issue, or without settling or disposing of his estate, then over to B., and A. had disposed of the estate in his lifetime, and it was therefore held that the devise to B. could not take effect, Lord Kenyon, C. J., said: "It seemed to me as if the parties had considered that a question would be made, Whether this were or were not an estate tail? If it had turned on that question, I should have thought it extremely clear that, on failure of the first limitation, the second might have taken effect as an executory devise." [See 32 Am. L. Reg. N. S. 1037.]

§ 70. In *Jackson v. Delancy*, 13 Johns. 537, 552, Kent, who was then Chancellor, spoke of the decision in *Jackson v. Bull* with approval. See 16 Johns. 583. In *Jackson v. Robins*, 15 Johns. 169, a testator devised his real and personal estate to A., but in case of her death without disposing of it by will or otherwise, then to B. The Supreme Court followed *Jackson v. Bull*, and held that A. took a fee, and the devise to B. was void. The case was carried

to the Court of Appeals (*Jackson v. Robins*, 16 Johns. 537), and there the theory that a devise depending on a contingency within the control of the first devisee was bad, was vigorously attacked, and the fallacy demonstrated, by the counsel for the plaintiff. See pp. 540-545. Chancellor Kent, however, came to the rescue (pp. 583-591). He said of *Attorney-General v. Hall* that there was no distinction taken between realty and personalty, whereas the whole argument and decision of that case went on the distinction. See § 68, *ante*. He said of Lord Kenyon's *dictum*, in *Beuchcroft v. Broome*, § 69, *ante*, that "it must have been in loose conversation on the bench," and that he apprehended "it is enough merely to mention such a *dictum*, and then to pass it by in silence." The argument for the plaintiff, it is submitted, states the cases more correctly, and argues from them more soundly, than the opinion of the Chancellor. The court, however, were unanimous in affirming the judgment below. The case was followed in New York, in *McDonald v. Waldgrove*, 1 Sandf. Ch. 274; [*McLeans v. Macdonald*, 2 Edm. 393; and see *Campbell v. Beaumont*, 91 N. Y. 464;] and Chancellor Kent lays it down as settled law in his Commentaries. 4 Kent, Com. 270.¹ [In *Van Horne v. Campbell*, 100 N. Y. 287, an unsuccessful attempt was made to induce the Court of Appeals to overrule *Jackson v. Robins*; the court held that the question must be considered as closed in New York. Ruger, C. J., dissented. He said: "It is now quite generally conceded that this claim cannot be sup-

¹ [In *Paterson v. Ellis*, 11 Wend. 259, 299, the cases of *Jackson v. Bull* and *Jackson v. Robins* were supposed to be authorities for a doctrine, that after the bequest of a chattel (and not of its use merely) no executory gift over is good; but this idea was corrected in *Norris v. Beyea*, 13 N. Y. 273; *Tyson v. Blake*, 22 N. Y. 558.]

ported upon principle, but is attempted to be upheld solely upon the ground of authority, and as a rule of property" (p. 313). As has been shown (§ 56 *g*, *ante*), the courts of New York have now laid hold of a provision in the Revised Statutes, passed probably with no such intent, to rid themselves of this doctrine which Chancellor Kent fastened upon them.¹ See also *Matter of Cager*, 111 N. Y. 343; *Crozier v. Bray*, 120 N. Y. 366; *Leggett v. Firth*, 132 N. Y. 7.

§ 71. In *Karker's Appeal*, 60 Pa. 141, on a gift to A. and his heirs, but, if he should die intestate and without issue, over, it was held that A. took a fee simple, and the gift over was bad, although the peculiar doctrine of Chancellor Kent, that an executory devise is bad if depending on a contingency within the control of the first taker, was not relied on. [See §§ 56 *c*, 56 *d*, *ante*.]

§ 71 *a*. [In *Fisher v. Wister*, 154 Pa. 65, a testator devised land to two grandsons, and added: "I hereby forbid that the property shall be sold out of the family, but leaving them at liberty to dispose of their respective parts by will. In case of the death of either one of them intestate without direct heirs, I direct that such intestate part shall be held by his sister." It was held that the grandsons took interests free from the gift over to the sister. The case was decided upon the report of the master, who rested the case on Chancellor Kent's doctrine. See also *Gillmer v. Daix*, 141 Pa. 505; *Good v. Fichthorn*, 144 Pa. 287. But cf. §§ 56 *c*, 56 *d*, *ante*.]

¹ [It is curious to observe the tone in which they now speak of this doctrine: "A wholly artificial and technical rule, founded, as I think, neither upon any policy or sound reasoning." *Per* Peckham, J., in *Greyson v. Clark*, 41 Hun, 125, 130.]

§ 72. In *Homer v. Shelton*, 2 Met. 194, 200, 201, the court do not seem firmly persuaded of the correctness of *Idle v. Idle* and *Jackson v. Bull*. In *Hubbard v. Rawson*, 4 Gray, 242, although the court say that *Idle v. Idle*, 5 Mass. 500, is not a parallel case, yet the principles of decision in the two cases seem irreconcilable. Land was devised to a trustee in trust for the separate use of L., a married woman, and her heirs, to pay to her the income, and, if required, the principal; if she survived her husband, to convey the land to her in fee; if she made any disposition by will or other writing, to convey the property to such persons as she named; if she did not make such disposition, then to convey it to her children as if she had died intestate. It was held that L.'s children took as purchasers, not by descent. Here was a case where L. took an equitable fee simple with a gift over if she did not dispose of it by her will or otherwise. On the doctrines of either *Gulliver v. Vanx*, or *Holmes v. Godson*, or *Idle v. Idle*, or *Jackson v. Robins*, this gift over was bad, and yet it was held good. The first estate was, the court say (p. 247), "an equitable fee simple contingent, liable to be defeated upon her dying before her husband, in case the estate was not conveyed by her order, and she had made no disposition of the property by will or other writing." And they add, "It was competent for the testator to make the devise over." The court do not seem to have perceived how far they were deviating from some of the earlier cases. See [*Sears v. Russell*, 8 Gray, 86, 100;] *Gifford v. Choate*, 100 Mass. 343; *Hale v. Marsh*, Id. 468; *Perry v. Cross*, 132 Mass. 454.

§ 72 a. [But in *Kelley v. Meins*, 135 Mass. 231, realty and personalty were devised to A. and his heirs, but if he should die without leaving issue, then any portion which

should remain was to go over. In a suit to recover the land devised the gift over was held repugnant. It should be observed that there was no power to dispose of the property by will. In *Welsh v. Woodbury*, 144 Mass. 542, there was held to be a life estate with a power. The court say: "The ground of *Kelley v. Meins* and that class of cases, whether concerning personal or real estate, is that the limitation over is an attempt to take away one of the incidents of ownership, and to say that, if the owner does not dispose of his property in his life or at his death, it shall devolve otherwise than as the law has provided." *Joslin v. Rhoades*, 150 Mass. 301, followed *Kelley v. Meins*. Finally, in *Foster v. Smith*, 156 Mass. 379, real and personal estate were devised to A., but if she did not dispose of it by deed or will, then over, and it was held that the gift over was bad.]

§ 73. In *Andrews v. Royce*, 12 Rich. 536, there was a devise of real and personal estate to A. and B. equally, but should either die unmarried and without issue, then whatever might remain of his moiety to the survivor; but should both die unmarried and intestate, then the estate remaining was to go over. Held, in an action for breach of a contract to buy the estate from A. and B., that their title was not indefeasible.¹ The court, struck with the fact that Chancellor Kent's theory seemed to find no support in the older books, asked a reargument, and came to the conclusion that it was not good law. But in *Moore v. Sanders*,

¹ [The opinion of the court is not entirely clear. It would rather seem as if they thought that A. and B. took life estates with power to appoint by will; and that, if they did have a fee, it was intended that any conveyance by deed should be overridden by the gift over on intestacy (pp. 545, 546). Both these propositions seem very doubtful. Cf. §§ 56 c-56 e, ante.]

15 S. Car. 440, a gift over on death intestate of a devisee was held bad; curiously enough, *Andrews v. Royce* was not cited. [In *Moore v. Sanders* the gift over was held bad, because in case the devisee alienated the estate, and then died intestate, his alienee would, if the gift over were good, lose his estate; and the gift over was a restraint on alienation. A more natural construction would seem to have been that the gift over was not intended to operate if the devisee conveyed in his lifetime.]

§ 74. A gift over after a devise of a fee simple, in case the devisee does not dispose of it in his lifetime or by his will, has therefore been often held void. But, considering the variety of the reasons given and their unsatisfactory character; and also the contrary cases of *Doe d. Stevenson v. Glover*, 1 C. B. 448; *Hubbard v. Rawson*, 4 Gray, 242; and *Andrews v. Royce*, 12 Rich. 536; the matter certainly deserves a more thorough consideration from the courts than it has yet received; and if the contingency of not making either a deed or a will is an illegal basis for an executory devise, some more reasonable ground for the proposition than those usually given is to be desired.

§ 74 *a*. [The doctrine that a gift over on the failure of a devisee to dispose of land either in his lifetime or on his death is void, has now a great weight of authority in its favor. Besides the Massachusetts, New York, and Pennsylvania cases cited above, §§ 67-72 *a*, *ante*, the same doctrine has been held in *Wolfer v. Hemmer*, 144 Ill. 554; *Ball v. Hancock*, 82 Ky. 107; *Combs v. Combs*, 67 Md. 11; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21. See also *Howard v. Carusi*, MacA. & Mack. 260; s. c. 109 U. S. 725; *McRee v. Means*, 34 Ala. 349; *Jamison v. Craven*, 4 Del. Ch. 311; *Mills v. Newberry*, 112 Ill. 123; *Wead v. Gray*, 78 Mo.

59; *Armstrong v. Kent*, 1 Zab. 509; and these cases show by no means the whole part that this doctrine plays in the recent books. The cases in which gifts over if the owner of property does not convey in his lifetime have been held bad (§§ 56–56 *d*, *ante*), and the cases of personal property (§§ 58, 62, 65, *ante*), though sustainable on other grounds, have in the vast majority of instances been based on the doctrine under discussion, and in the American cases the reason generally given is that put forth by Chancellor Kent in *Jackson v. Bull* and *Jackson v. Robins*, §§ 69, 70, *ante*.]

§ 74 *b*. [The establishment of this doctrine is an interesting instance of what naturalists call a reversion to a primitive type. In the barbarous stages of law, courts thwart the intention of parties to transactions by rules and restrictions which are not based on considerations of public advantage, but are formal, arbitrary, and often of a *quasi* sacred character. The process of civilization consists in the courts endeavoring more and more to carry out the intentions of the parties or restraining them only by rules which have their reason for existence in considerations of public policy. There are some of the old rules whose vitality has proved too strong to be dealt with by the courts and which have to await the hand of the Legislature,—such, for instance, as the Rule in Shelley's Case; but for the courts to invent a new rule, not called for by any considerations of public policy, for the purpose of thwarting the intentions of parties, is unusual at the present time; but such a case we have here.]

§ 74 *c*. [A. gives a piece of land to B. and his heirs, and says, "You may do with this just as you please, in life or by will, but if you do not part with it, and do not de-

wise it, it shall go to C." This gift to C. is bad. Why? What are the reasons given? They are, *First*, that the gift over is repugnant; *Second*, that the passage of a fee simple on death of the tenant intestate to the heirs is a necessary incident of the estate; *Third*, that an executory devise contingent upon a circumstance which it is in the power of the first taker to prevent happening is void. The first is the reason originally given; the second is the reason given by *Fry, J.*, in *Shaw v. Ford*; the third is Chancellor Kent's. But these are only words. They merely mean that the courts have set up a certain rule, and that the proposed provision is inconsistent with it; but why that rule should be set up, what interests are forwarded by it, how it helps the well-being, moral or material, of the community, the courts never show, and, to do them justice, never attempt to show. In the hundreds of pages in the reports on this subject, there is no suggestion that this rule tends to promote any good object.]

§ 74 *d.* [It is to be observed that the rule is not a rule of construction, it is not a rule to carry out the intention of the parties, but its avowed purpose is to defeat that intention. The courts always recognize this fact; and that no considerations of public policy are involved, is shown by its being perfectly easy to carry out the desired result by a slight change of phrase. If you give a man a fee simple, you cannot provide that if he does not sell or devise it it shall go to T., but if you give him a life estate with power to appoint by deed or will, and in default of appointment to T., the gift to T. is perfectly good. In both cases the intention is clear and undisputed; when you defeat the intention in one case, you are defeating exactly the intention that is preserved in the other.]

§ 74 *e*. [It is often a question of the greatest difficulty to determine whether a testator has given a devisee a life estate with general power of appointment, or whether he has given him a fee with an executory devise over in case the first taker shall not dispose of his interest. If it were not for this rule, that question would almost never become material. But now that a testator's intention, if expressed in one form, cannot be carried out, while it can be, if expressed in another, the question becomes of vital importance, and consequently this arbitrary rule is responsible for an enormous amount of litigation.¹]

§ 74 *f*. [The peculiarity of this doctrine is its modern origin. It makes its first appearance in *Idle v. Idle*, 5 Mass. 500, in 1809, when it was founded upon a misunderstanding of the case of *Attorney-General v. Hall*, Fitzg. 314. No judge has ever given a rational reason for its existence, and several judges, e. g. Lord Truro, C., in *Watkins v. Williams*, 3 Macn. & G. 622, 629; *Fry, J.*, in *Shaw v. Ford*, 7 Ch. D. 669, 673; *Parker, C. J.*, in *Eaton v. Straw*, 18 N. H. 320, 331, have spoken of it with thinly veiled contempt. In many States, as the above cited cases show, the doctrine has become a rule of property, and is past help by the courts; but in those jurisdictions where it has not already taken root, it would seem to deserve consideration whether this pseudo-archaic and vexatious doctrine should be al-

¹ [A few of the cases in which the decision of this question has been attended with great doubt and difficulty, but which have not generally been mentioned in the text, because the conclusion of the court was that a life estate with powers and not a fee simple was granted, are: *Stuart v. Walker*, 72 Me. 145; *Copeland v. Barron*, Id. 206; *Welsh v. Woodbury*, 144 Mass. 542; *Chase v. Ladd*, 153 Mass. 126; *Kent v. Morrison*, Id. 137; *Burleigh v. Clough*, 52 N. H. 267; *Kent v. Armstrong*, 2 Halst. Ch. 637; *Crozier v. Bray*, 120 N. Y. 366; *Rose v. Hatch*, 125 N. Y. 427; *Taylor v. Ball*, 158 Pa. 651.]

lowed to establish itself. See on this subject a valuable note by Edward Brooks, Jr., Esq., to the case of *Fisher v. Wister*, 32 Am. L. Reg. N. S. 1035.]

§ 74 *g*. [A real objection to allowing a full power of disposal, and at the same time a gift over upon failure to dispose, does not seem to have been discussed. It is that if a creditor should take such an estate in fee of his debtor on execution, and the debtor should die intestate, the purchaser at the execution sale would lose the land. But this is nothing more than would happen if the debtor had a life estate with power to appoint by deed or will, and had died intestate. Probably the best way would be to consider such a gift over as void, on just grounds of public policy, as against sales on execution, or, in better shape, to make the transfer *inter vivos* which defeats the gift over extend to an involuntary transfer.]

B.

ESTATES TAIL.

§ 75. [A condition against alienation annexed to a gift to a man and the heirs of his body made prior to the Statute of Westm. II., 13 Edw. I. c. 1, De Donis, was invalid. *Per* Varasour, J., 13 Hen. VII. 24. But since that statute] a condition against alienation attached to an estate tail is effectual and can be enforced if the tenant in tail makes a feoffment or levies a fine at common law. For such act is unlawful, a fine of an estate tail being expressly declared void by the St. De Donis, § 4. [13 Hen. VII. 22-24.] *Anon.*, Jenk. 242, 243. *Crocker v. Trevithin*, Cro. El. 35; s. c. 1 Leon. 292. [So a clause of cesser upon alienation of an estate tail is good.] *Newis v. Lark*,

Plowd. 403, 408 ; s. c. Benl. 196. *Sharrington v. Minors*, Moore, 543.¹ See [21 Hen. VI. 3, pl. 21 ; 8 Hen. VII. 10, pl. 3 ;] *Jermine v. Arscot*, 4 Leon. 83 ; s. c. Moore, 364 ; 1 And. 186 ; *Arton v. Hare*, Poph. 97 ; *Anon.*, 1 Brownl. 45 ; *Chomley v. Humble*, Cro. El. 379 ; *Foy v. Hynde*, Cro. Jac. 697 ; [Lit. § 362 ; Doct. & St., Dial. II. c. 35.]² So a condition or limitation attached to a gift in tail, that the donee shall not make a lease for years is valid. *Spittle v. Davie*, 2 Leon. 38 ; s. c. Moore, 271. [But it is said that a condition that a tenant in tail shall not lease for the term of his own life is bad. *Mildmay's Case*, 6 Co. 40 *a*, 42 *b*, 43 *a* ; but to this last Co. Lit. 223 *b* is *contra*. See *Re Rosher*, 26 Ch. D. 801, 818.]

§ 76. It was held in *Pierce v. Win*, 1 Vent. 321, s. c. Pollexf. 435, that a condition to *attempt* to alien an estate tail was void for uncertainty, and therefore no entry could be had by the grantor on one to whom the tenant in tail had made a feoffment, although, if the condition had been against aliening, the grantor could have entered upon the feoffee, and see *Mildmay's Case*, 6 Co. 40 *a* ; *Foy v. Hynde*, Cro. Jac. 697. But it is doubtful how far this is law at present.

¹ [The statement in *Mary Portington's Case*, 10 Co. 35 *b*, 42 *a*, that *Newis v. Lark* was overruled in the Queen's Bench, appears to be incorrect. See *Sharrington v. Minors*, *ubi supra* ; *Bateman v. Allen*, Cro. El. 437 ; Plowd. 408, marginal note.]

² Whether in the cases cited in the text the fines levied were really common-law fines (see *Mary Portington's Case*, *ubi supra*), or whether the distinction between fines levied at common law and fines levied under the Sts. of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, was not then plainly recognized, is not clear. The distinction certainly seems to have been overlooked in *Rudhall v. Milward*, Moore, 212 ; s. c. 1 Leon. 298 ; Sav. 76 ; Fearne, C. R. 259. There has been no question in modern times that fines levied in accordance with those statutes stand on the same footing as common recoveries. *Vide*, § 77, *post*.

§ 77. An estate tail is barred, and all conditions or conditional limitations attached to it are destroyed, by a common recovery or by a fine levied in accordance with the Sts. of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, and the right to suffer such recovery or levy such fine cannot be restrained by any condition. Co. Lit. 223 *b*, 224 *a*. *Corbet's Case*, 1 Co. 83 *b*; s. c. Moore, 601; 2 And. 134. *Mildmay's Case*, 6 Co. 40 *a*; s. c. *sub nom.* *Mildmay v. Mildmay*, Moore, 632. *Sondray's Case*, 9 Co. 127 *b*. *Dawkins v. Penrhyn*, 6 Ch. Div. 318; s. c. 4 Ap. Cas. 51. See *King v. Burchell*, Amb. 379. And the condition fails not merely for the technical reason that, by the barring of the estate tail, the condition is gone with it; but because the law does not permit the alienation of an estate tail by a recovery to be restrained. Therefore, a condition that the donee shall not agree to suffer a recovery, or do any act towards it, is void. *Mary Portington's Case*, 10 Co. 35 *b*. [*Stansbury v. Hubner*, 73 Md. 228. *Re Colliton and Landergan*, 15 Ont. 471.] See *Taylor v. Shaw*, Carter, 6, 22; *Collins v. Plummer*, 1 P. Wms. 104; s. c. 2 Vern. 635; *Mainwaring v. Baxter*, 5 Ves. 458. Compare *Taylor d. Athyngs v. Horde*, 1 Burr. 60, 84; *Fearne*, C. R. 257 *et seqq.*; Co. Lit. 223 *b*, Butler's note; *Lewis*, Perp., c. 4, pp. 44 *et seqq.*; [2 Jarm. Wills (5th ed.), 860;] *Tudor*, L. C. on Real Prop. (3d ed.) 463, 972. [In *Poole's Case*, cited in *Tatton v. Mollineux*, Moore, 809, 810, on a gift in tail an obligation was entered into by the donee that he would not alienate. The Court of Chancery, with the advice of Coke, C. J., ordered the obligation cancelled. But in the First Institute, Lord Coke, after saying that on a feoffment in fee a condition not to alienate is void, adds, "But if the feoffee be bound in a bond, that the feoffee or his heirs shall not alien, this

is good, for he may notwithstanding alien if he will forfeit his bond that he himself hath made." Co. Lit. 206 *b*. But he cites no authority for this statement. In *Freeman v. Freeman*, 2 Vern. 233; s. c. Prec. Ch. 28, a father settled land upon his son in tail, and took a bond from him not to dock the entail. The son suffered a common recovery, and the bond was put in suit. A bill in equity to be relieved against the bond was dismissed, and see *Collins v. Plummer*, *ubi supra*. On the other hand, in *Jervis v. Bruton*, 2 Vern. 251, *Poole's Case* is referred to with approval. *Sem- ble*, *Poole's Case* is better law.]

C.

ESTATES FOR LIFE.

§ 78. A provision in the gift of a life estate or interest that the estate or interest shall [cease or shall] go over to a third person upon alienation, voluntary or involuntary, of the life estate or interest, is good. This seems to have been first held in 1733, in *Lockyer v. Savage*, 2 Stra. 947, (where it was placed on the analogy of conditions against alienation in leases for years,) and is now thoroughly settled. Among the cases in which such gifts over [or provisos for cesser] have been held good are [*Dommett v. Bedford*, 6 T. R. 684;] *Shee v. Hale*, 13 Ves. 404; [*Wilkinson v. Wilkinson*, 3 Swanst. 515;] *Cooper v. Wyatt*, 5 Madd. 482; [*Stephens v. James*, 4 Sim. 499; *Lewes v. Lewes*, 6 Sim. 304;] *Martin v. Margham*, 14 Sim. 230; *Rochford v. Hackman*, 9 Hare, 475; *Brandon v. Aston*, 2 Y. & C. C. C. 24; *Re Edgington's Trusts*, 3 Drew. 202; *Manning v. Chambers*, 1 DeG. & Sm. 282; *Carter v. Carter*, 3 K. & J. 617; *Bar-*

nett v. Blake, 2 Dr. & Sm. 117; *Re Muggeridge's Trusts*, II. R. V. Johns. 625; *Sharp v. Cosserat*, 20 Beav. 470; *Haswell v. Haswell*, 28 Beav. 26; *Dorsett v. Dorsett*, 30 Beav. 256; *Townsend v. Early*, 34 Beav. 23; *Freeman v. Bowen*, 35 Beav. 17; *Montefiore v. Behrens*, Id. 95; *Oldham v. Oldham*, L. R. 3 Eq. 404; *Roffey v. Bent*, Id. 759; *Craven v. Brady*, L. R. 4 Eq. 209; s. c. 4 Ch. 296; [*Re Parnham's Trusts*, L. R. 13 Eq. 413;] *Re Amherst's Trusts*, Id. 464; *Billson v. Crofts*, L. R. 15 Eq. 314; [*Re Aylwin's Trusts*, L. R. 16 Eq. 585;] *Ex parte Eyston*, 7 Ch. Div. 145; [*Hurst v. Hurst*, 21 Ch. Div. 278; *Nixon v. Verry*, 29 Ch. D. 196; *Re Levy's Trusts*, 30 Ch. D. 119; *Robertson v. Richardson*, Id. 623; *Re Bullock*, 60 L. J. N. S. Ch. 341; s. c. 64 L. T. N. S. 736; 39 W. R. 472; *Metcalf v. Metcalf*, 43 Ch. D. 633; s. c. [1891] 3 Ch. 1;] *Caulfield v. Maguire*, 5 Ir. Ch. 78; [*Re Moore's Estate*, 17 Ir. L. R. 549;] *Nichols v. Eaton*, 91 U. S. 716; *Bramhall v. Ferris*, 14 N. Y. 41; *Emery v. Van Syckel*, 2 C. E. Green, 564; [*Waldo v. Cummings*, 45 Ill. 421; *Camp v. Cleary*, 76 Va. 140; *Bull v. Kentucky Bank*, 90 Ky. 452; *Paris v. Winterburn*, 6 Ohio, C. C. 635. See *Conger v. Lowe*, 124 Ind. 368.] There are also many cases in which it has been held, on the construction of a will or other instrument, that no gift over of a life interest was intended upon the events that have happened, but in which the legality of such gift over has been always assumed. A gift to be defeated by alienation need not take the form of a gift till alienation, but may be an out and out gift with a proviso for going over on alienation, as in the leading case *Lockyer v. Savage*, 2 Stra. 947. [See *Wilkinson v. Wilkinson*, 3 Swanst. 515, 522;] 2 Jarm. Wills (5th ed.), 870, note s; 13 Jur. pt. 2, 206.

§ 78 a. [In *Weale v. Ollive*, 32 Beav. 421, a testator gave property to trustees to pay the income to T. for life, "but he shall have no power to sell or mortgage this life interest to any other person, and in case of so doing he shall forfeit his interest from the said funds," and they to go over. Sir John Romilly, M. R., decided that on the whole will T. took an absolute and not a life interest, but he said that the declaration quoted was "wholly void." "The testator might have given the income of the property to" T. "until he became bankrupt or insolvent, and then have given it over to another person; but it was not competent to him to give a life estate, and then to say he should not dispose of it." And in *Powell v. Boggis*, 35 Beav. 535, he used similar language. His meaning is not clear, but if he meant that a gift of income to A. until he dies or assigns, and then to B., is good, but that a gift of income to A. for life, but, if he assigns it, then to B., is bad, the statement is not law. Both gifts are good. *Lockyer v. Savage*, *Dommett v. Bedford*, *Wilkinson v. Wilkinson*, *Cooper v. Wyatt*, *ubi supra*, and many of the other cases cited in the preceding section.]

§ 79. It has been sometimes said, that, though a limitation over of a life estate on alienation is good, a condition without a gift over is not. Thus, in 1 Roper, Leg. (4th ed.) 786: "It is presumed that, if a legacy were given to A. for life, with a proviso for its determination if A. made any disposition of his life interest, the condition would be repugnant and void," citing *Brandon v. Robinson*, 18 Ves. 429; s. c. 1 Rose, 197. And again Vice-Chancellor Wood, in *Stroud v. Norman*, Kay, 313, 330, says: "The difference between a mere condition to divest a gift and a limitation over, will occur to every one. In no case is it more appar-

ent than in a limitation of property to A. for life, with a declaration that in the event of his bankruptcy it should cease, or that he should have no power of assigning it, as in *Brandon v. Robinson*. In such a case the condition is void, and the disposition of the property is absolute."

§ 80. But Vice-Chancellor Turner in *Rochford v. Hackman*, 9 Hare, 475, has shown that Lord Eldon, in *Brandon v. Robinson*, meant to say that a life interest could not continue to exist without its incidents, and did not mean to deny that it could be determined by a condition or simple proviso of cesser; and Vice-Chancellor Wood has approved the remarks in *Rochford v. Hackman*, and has himself decided that a provision that a life estate should cease upon alienation is good without a gift over. *Joel v. Mills*, 3 K. & J. 458. *Pearson v. Dolman*, L. R. 3 Eq. 315, 320. [So *Ex parte Eyston*, 7 Ch. Div. 145; *Hurst v. Hurst*, 21 Ch. Div. 278, 283.] And the point had been so decided in the earlier case at law of *Dommelt v. Bedford*, 6 T. R. 684. See also *Shee v. Hale*, 13 Ves. 404; 2 Jarm. Wills (5th ed.), 877; Tudor L. C. on Real Prop. (3d ed.) 982. No doubt need now be felt that a life estate may be terminable by a condition against alienation, as well as by a limitation.

§ 81. In *Jackson v. Groat*, 7 Cow. 285, there was a condition in a lease for life, that the lessee should not sell his interest, without offering it to the lessor, nor without paying him a tenth of the price. It was held that the condition was good. And see *Jackson v. Silvernail*, 15 Johns. 278; and *Livingston v. Stickles*, 7 Hill, 253.

§ 82. In *re Wolstenholme*, 43 L. T. N. S. 752, s. c. 29 W. R. 414, there was a devise in trust for A. during his life, and on his death as he should by deed or will appoint, and,

in default of appointment, to his children; but if the income should, from any cause whatever, cease to be payable to him as an inalienable provision, then the gift over should take effect as if A. were dead. Malins, V. C., held that the clause of forfeiture was void. A., by exercising the power by deed, would be at once possessed of the whole equitable interest, and the restraint against alienation would be substantially like a restraint on the alienation of a fee simple. See *Bradley v. Peixoto*, 3 Ves. Jr. 324.

§ 82 a. [The doctrine of *Re Wolstenholme* was carried farther, and, it is submitted, too far in *Bland v. Bland*, 90 Ky. 400. A testatrix gave the residue of her estate to a trustee in trust that her brothers E. and J. should each annually (or oftener at the trustee's discretion) receive from the trust the income of the estate, each one half; that the interest of neither should be, in any manner, directly or indirectly, liable for his debts; and she declared that if by any legal proceedings against the trustee or her brothers, or either of them, the income "shall be attempted to be subjected to the debts" of either of her brothers, then the income which it was sought so to subject should be added to the fund. She further declared that if either E. or J. should die unmarried and childless, then the other should have the whole income during his life, "but the one so dying first may, by will, devise one half of the principal to whom he soever desires, but such devise not to take effect until the death of the surviving brother," and the survivor might dispose of the other half by will; but if either died intestate, then over. The court held that the power to dispose of the property by will made the provision for forfeiture invalid, and that the judgment creditor of one of the brothers could maintain a bill in equity to have his

debt paid out of the fund. This seems very questionable, and what is still more doubtful, it appears that the court allowed the creditor to sell the principal of the fund to satisfy his debt against the life tenant.]

§ 83. The right of an annuitant in certain cases to have the value of the annuity paid to him outright, has raised curious questions when the annuity is made terminable on assignment or bankruptcy. If a testator bequeaths an annuity out of his estate, or dies leaving his estate charged with an annuity, the annuitant is not entitled to be paid the value of the annuity as a gross sum. *Yates v. Yates*, 28 Beav. 637. But if the testator directs a certain sum to be laid out in an annuity, or an annuity of a certain amount to be purchased, as the annuitant could at once sell the annuity, he is entitled to the value of it instead; and if he dies before the annuity is purchased, his executors are entitled to the value. *Yates v. Compton*, 2 P. Wms. 308. *Barnes v. Rowley*, 3 Ves. Jr. 305. *Palmer v. Craufurd*, 3 Swanst. 482. *Dawson v. Hearn*, 1 Russ. & M. 606. *Ford v. Batley*, 17 Beav. 303; 2 W. & T. L. C. in Eq. (5th ed.) 257. And this although the will expressly directs that the annuitant shall not have the value of the annuity in an outright sum. *Stokes v. Cheek*, 28 Beav. 620. [*Roper v. Roper*, 3 Ch. D. 714, 721.]

§ 84. So when, after a life interest given to A., a certain sum was to be laid out in the purchase of an annuity for B., and B. died before A., Sir William Grant, M. R., held that B.'s representative was entitled to the sum. *Bayley v. Bishop*, 9 Ves. 6.

§ 85. And the annuitant (not being a married woman) is not deprived of the right to have the value of the annuity paid to him because the will contains a clause forbidding

him from anticipating it, if there is no provision of cesser or gift over. *Woodmeston v. Walker*, 2 Russ. & M. 197. *Re Broome's Will*, 27 Beav. 324. *Day v. Day*, 22 L. J. Ch. 878, 880, 881; s. c. 17 Jur. 586. And see §§ 134 *et seqq.*, *post*.

§ 85 *a*. [But in those jurisdictions, e. g. Massachusetts and Pennsylvania, where spendthrift trusts are allowed, it would seem that under a will containing such a clause the annuitant would not be entitled to have payment made to him or her, and, not having an immediate right to the money, it would also seem that in case of the annuitant's death before the purchase of the annuity, his or her executor would take nothing. See, however, the following sections.]

§ 86. What, then, are the rights of the annuitant, when there is a gift over of the annuity upon bankruptcy or alienation? In *Day v. Day*, 22 L. J. Ch. 878; s. c. 17 Jur. 586; badly reported in 1 Drew. 569, property was given to trustees in trust to pay the income to A. for life, and on her death to sell it and invest the proceeds in an annuity for the life of B., and to pay it to B. until he should assign it or become bankrupt, and on such assignment or bankruptcy to pay it to C. B. died in the lifetime of A., never having assigned the annuity or having become bankrupt. Kindersley, V. C., held, that, as B. had never assigned the annuity or become bankrupt, C. had no claim; that B. was entitled to the annuity, subject to a contingency; and that, as the contingency could now never happen, B.'s representatives were entitled, on the authority of *Bayley v. Bishop*, 9 Ves. 6, § 84, *ante*, to have the property transferred to them. The Vice-Chancellor said that, had B. assigned his interest or become bankrupt in the lifetime of A.,

C. would have been entitled to the property. 22 L. J. Ch. 831.

§ 87. In *Power v. Hayne*, L. R. 8 Eq. 262, precisely the same question as arose in *Day v. Day*, came before Malins, V. C., and he decided it precisely to the contrary, and held that neither B.'s representative nor C. was entitled. [The decision in *Day v. Day* seems to be the logical consequence of *Bayley v. Bishop*, § 84, *ante*, where the test applied was whether the legacy for an annuity was subject to a condition precedent or not. Postponement to a life estate was held, in accordance with the general rule, not to be a condition precedent, and the gift over upon assignment or bankruptcy was a condition subsequent and not precedent. If *Bayley v. Bishop*, therefore, is law, *Day v. Day* seems correct. But as an original matter, the decision in *Bayley v. Bishop* is very questionable. The option of the annuitant is not to have cash at once, but to have at the termination of the life estate so much cash as would then buy an annuity, which, if the annuitant dies during the life estate, is nothing. So if the annuity is to cease or go over on the assignment or bankruptcy of the annuitant, his interest is so uncertain that it cannot be calculated in money, and, from this point of view, *Power v. Hayne* is right. *Power v. Hayne* has been followed by Kekewich, J., in *Re Draper*, 57 L. J. N. S. Ch. 942.]

§ 88. In *Hatton v. May*, 3 Ch. D. 148, where trustees were directed to purchase an annuity for the life of M., a single woman, and to pay it to her for her separate use, (without any right to have its gross value paid to her,) until she should assign or anticipate it, it was held by Malins, V. C., that M. was not entitled to have the value of the annuity paid to her, but that the trustees must hold it

until she did some act of alienation. [See *Roper v. Roper*, 36 Ch. D. 714, 721 ;] 2 Jarm. Wills (5th ed.), 373 ; 1 Jarm. Wills (5th ed.), 368. [A *fortiori* where spendthrift trusts are allowed. See § 85 *a*, *ante*.]

§ 89. In *Hunt-Foulston v. Furber*, 3 Ch. D. 285, a testator gave £20,000 stock to be laid out by trustees in the purchase of a government annuity in the name and for the benefit of J. for his life, and directed that, if J. should sell, mortgage, pledge, or anticipate his annuity, the same should cease and determine, and form part of the testator's residuary estate. The trustees purchased the annuity, and J. contracted to sell it to the plaintiff. Held, by Hall, V. C., that the proviso was void, and that J. could transfer a good title to the plaintiff. The decision apparently goes upon the distinction that the annuity was taken in the name of the annuitant, and not of the trustees. Otherwise it is inconsistent with *Shee v. Hale*, 13 Ves. 404, and *Power v. Hayne*, L. R. 8 Eq. 262, which were cited by counsel, but which the Vice-Chancellor said had "very little bearing." But the distinction is of questionable validity. Although the annuity for the life of J. stands in his name, does he not hold it upon trust for himself until alienation, and then in trust for those entitled to the residue? The interposition of a third person as trustee does not seem to vary the principle. The right to receive an annuity for life seems as much a life interest, and no more an absolute interest, than a legal life estate, or the right to receive from trustees the income of a fund for life. The two latter are assignable for a gross sum, as much as is the former. A gift over on alienation of the former should be as valid as on alienation of either of the latter. The decision in *Hunt-Foulston v. Furber* is, however, stated as if sound law in

1 Jarm. Wills (5th ed.), 368, note *g*; 2 Jarm. Wills (5th ed.), 879. See Tudor, L. C. on Real Prop. (3d ed.) 974. [In *Re Mabbett* [1891], 1 Ch. 707, 713, Kekewich, J., held that a proviso in a gift of an annuity that on any assignment of the annuity it should cease was void. He said: "A proviso such as I find in this will, expressed merely *in terrorem*, that is to say, without any gift over, is not allowed to take effect;" and he quotes the language of Malins, V. C., in *Roper v. Roper*, 3 Ch. D. 714, 721: "A declaration that the widow shall not have the value of her annuity, that goes for nothing; but in order to prevent her having the value there must be a gift over." But Malins, V. C., did not, it is submitted, intend to say that a proviso for cesser of an annuity on alienation was void; but that, if there was neither a gift over nor a proviso for cesser, a direction that the annuitant should not alienate would be inoperative. Surely the absurd doctrine of conditions *in terrorem* ought not to be extended beyond those cases (marriage and disputing a will) in which it has already been established. Considering then the totally different grounds on which it has been attempted to distinguish *Hunt-Foulston v. Furber* and *Re Mabbett* from *Hatton v. May*, *ubi supra*, and the unsatisfactory character of the reasoning by which it has been attempted to support them, it is submitted they ought to have followed the fate of *Hatton v. May*, and if in that case the value of the annuity was properly refused to the annuitant, in the other two cases the proviso for terminating the annuity should have been held good. That *Hatton v. May* is right cannot be positively affirmed in the face of *Day v. Day*. The latter case does not, indeed, directly contradict the former, but the grounds on which they rest are hardly consistent. On principle it would seem that a

gift over or proviso of cesser upon the alienation or bankruptcy of the annuitant is valid, and suffices to prevent the annuitant or his representatives from being entitled to the value of the annuity in cash.]

§ 90. Thus far we have seen that conditions or limitations against or on alienation may be attached to life interests given to others, and that the alienation aimed at may be either voluntary, as by sale, or involuntary, as by bankruptcy. It remains to consider how far a man may settle property on himself for life to go over on his alienation. We will take up first involuntary alienation or bankruptcy, and afterwards voluntary alienation, for perhaps there is a difference, in the case of a settlement on one's self, between voluntary and involuntary alienation, which certainly does not exist in case of a gift to others.

§ 91. It is deemed against public policy to allow a man to settle property on himself until his death or bankruptcy, and then over; or to settle a life interest which he possesses upon himself until bankruptcy, and then over; in either case, upon his bankruptcy, an interest for his life passes to his assignees. This rule must not be confounded with the doctrine that a man cannot make a voluntary conveyance in fraud of his creditors. See *Murphy v. Abraham*, 15 Ir. Ch. 371; [*Re Pearson*, 3 Ch. D. 807]. This present rule goes farther, and forbids a man, even for good consideration, to make a grant over of his life interest contingent on his bankruptcy as a condition precedent. If he reserves a life interest, it will go to his assignees in bankruptcy, despite any condition or limitation, even though the gift over after his death is valid because made on good consideration, e. g. on marriage. Tudor, L. C. on Real

Prop. (3d ed.) 982. Indeed, it is on marriage settlements that most of the cases have arisen. *Higinbotham v. Holme*, 19 Ves. 88. *Lester v. Garland*, 5 Sim. 205. *Ex parte Oxley*, 1 Ball & B. 257. See *Casey's Trusts*, 4 Ir. Ch. 247 (reversing 3 Ir. Ch. 419); *Clarke v. Chambers*, 8 Ir. Ch. 26.¹ [On the effect of coverture upon a woman's settlement of her own property upon herself, see § 277 *a, post.*]

§ 92. A woman's property may, however, be settled on her intended husband for life or until his bankruptcy, and so property in which she has an equity for a settlement. *Montefiore v. Behrens*, 35 Beav. 95; s. c. L. R. 1 Eq. 171. And a settlement by a husband of his property on himself until he becomes bankrupt, and then for the benefit of his wife, (or a bond payable to her on his bankruptcy), is valid to the extent of the property he has received from her. *Ex parte Cooke*, 8 Ves. 353. *Ex parte Hinton*, 14 Ves. 598. *Ex parte Hodgson*, 19 Ves. 206. *Ex parte Young*, 3 Mad. 124; s. c. Buck, 179. *Lester v. Garland*, 5 Sim. 205. *Ex parte Shute*, 3 Deac. & Ch. 1. *Re Meaghan*, 1 Sch. & L. 179. *Higginson v. Kelly*, 1 Ball & B. 252. *Ex parte Verner*, Id. 260. *Corr v. Corr*, 3 Ir. L. R. 435. [*Re Callan's Estate*, 7 L. R. Ir. 102.] Tudor, L. C. on Real Prop. (3d ed.) 984.

§ 93. Although the limitation over is usually for the benefit of the settlor's wife and children, other limitations over are equally void. Thus A. settled a life interest which

¹ So a bond payable on bankruptcy to trustees for a wife cannot be enforced. *Ex parte Hill*, 1 Cooke, Bkr. Law, 228. *Ex parte Bennet*, Id. 229. And a bond payable on bankruptcy or death cannot be enforced as due on bankruptcy. *In re Murphy*, 1 Sch. & L. 44. *Ex parte Taaffe*, 1 Gl. & J. 110. But such a bond can, in bankruptcy, be valued as a debt payable *in futuro* (i. e. on the bankrupt's death), and be proved on such valuation. *Ex parte Boddam*, 2 DeG. F. & J. 625. Tudor, L. C. on Real Prop. (3d ed.) 983.

he had on himself until he became bankrupt or insolvent, or some creditor proceeded against the fund, and then for the benefit of certain specified creditors. A creditor, not one of those specified, obtained a charging order against the fund. Held that the limitation over was void. *Synge v. Synge*, 4 Ir. Ch. 337. See s. c. in the court below, 3 Ir. Ch. 262; and *Ex parte Vere*, 19 Ves. 93, 99, note; s. c. 1 Rose, 281.

§ 94. It has been held that the interest of a partner in a term for years (and *semble, a fortiori*, in a life estate) cannot be limited over to his copartners upon his bankruptcy. *Whitmore v. Mason*, 2 J. & H. 204. And see *Wilson v. Greenwood*, 1 Swanst. 471.

§ 95. In *Synge v. Synge*, 4 Ir. Ch. 337, stated § 93, *ante*, it will be observed that the limitation over which was declared void was not on bankruptcy, but on a proceeding by a single creditor. [But in *Re Detmold*, 40 Ch. D. 585, A. in his marriage settlement settled his own property in trust to pay the income to himself for life, or until he should become bankrupt, or assign or charge the income, or do or suffer something whereby the same, through his act, or default, or by operation or process of law, would, if belonging absolutely to him, become vested in or payable to some one else, and then in trust to pay to his wife during her life. A judgment creditor of A. proceeded against the income, and had himself appointed receiver. North, J., held that the limitation over to A.'s wife took effect. He distinguished the cases in bankruptcy on the ground that such a settlement was in fraud of the bankrupt act, and he rested largely upon the cases, see §§ 97, 98, *post*, in which it had been held that a limitation over upon voluntary alienation was good. Even assuming that the cases referred to were

rightly decided, it hardly seems to follow that a limitation over on process by a creditor is good. To allow such a limitation seems a hindrance to creditors, varying only in degree from a limitation over in case of bankruptcy. *Synge v. Synge*, which was not called to the attention of the learned judge in *Re Detmold*, seems the better law.] On the general question of provisions to take effect on bankruptcy, see *Ex parte Mackay*, L. R. 8 Ch. 643; *Ex parte Williams*, 7 Ch. D. 138; [*Re Blanshard*, 8 Ch. D. 601; *Re Stockton Iron Furnace Co.*, 10 Ch. Div. 335; *Ex parte Jay*, 14 Ch. Div. 19; *Ex parte Jackson*, Id. 725; *Ex parte Voisey*, 21 Ch. Div. 442; *Ex parte Barter*, 26 Ch. Div. 510;] Tudor, L. C. on Real Prop. (3d ed.) 983. As upon a settlement of a man's property upon himself a clause of forfeiture on alienation is bad, so, *a fortiori*, upon such settlement a clause forbidding alienation is bad, even where, as in Massachusetts, such a clause is good in a settlement upon another. See §§ 268 *a*, 268 *b*, *post*. [On restraint upon alienation in settlements upon the settlor himself, see also § 277 *a*, *post*.]

§ 96. Having thus seen that a man cannot settle his own property so that he shall enjoy it until its involuntary alienation [or, at any rate, until bankruptcy], and that then it shall go over, it remains to see whether he can settle it upon himself till he voluntarily alienates, and provide that upon such voluntary alienation it shall go over. In *Phipps v. Ennismore*, 4 Russ. 131, A., intending to marry B., demised lands, of which he was life tenant, to trustees for ninety-nine years, to secure the payment of a yearly sum of money to his wife as pin-money, and limited a jointure to her. By a separate deed, executed at the same time, he covenanted not to sell or incumber the lands, and declared

that, should he do so, the trustees were to apply the rents as they should think proper for the maintenance and support of A. or his wife or issue. The marriage was had, and A. incumbered his interest. Lord Lyndhurst, C., held that the gift over on sale or incumbrance was void, and the incumbrance was good. He said: "The only question which admits of doubt is, Whether the provision can be sustained against the incumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands that the parties to the deed did not contemplate a fraud; but the transaction is, in its very nature, fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and in that event only, was the instrument in question to have operation. In point of law, the deed cannot be sustained." (p. 141.) The counsel for the incumbrancer put the matter neatly: "Can a man be allowed to covenant that, if he sells his estate, the purchaser shall not have it, but it shall go to a trustee, who is to apply the rents for the benefit of the vendor and his family?"

§ 97. In *Brooke v. Pearson*, 27 Beav. 181, A. by marriage settlement conveyed real estate to trustees upon trust to pay the rents to himself during the joint lives of himself and B., his intended wife, until he should sell or incumber the same, or until his bankruptcy or insolvency, and after such sale, incumbering, bankruptcy, or insolvency, in trust during the joint lives of A. and B. to pay £300 annually to B. for her separate use, and the residue to A. The marriage took place in 1854. In 1855 A. mortgaged the prop-

erty, and in 1858 was adjudged bankrupt. B. claimed that, upon the execution of the mortgage, the rent charge arose to her; there was no question between her and the mortgagee, the property being apparently sufficient for both, but the assignees in bankruptcy claimed that as to them the rent charge was invalid. Lord Romilly, M. R., held that the rent charge arose when the property was mortgaged, and was therefore in existence at the time of the bankruptcy, and did not pass to the assignees. He said, "It is not necessary to go into the question whether the rent charge has priority over the mortgage, because that matter is arranged between the parties." No cases are referred to in the opinion, although *Phipps v. Ennismore*, *ubi supra*, was cited by counsel. There is no reason in public policy why an interest limited to arise on a conveyance should not be sustained so far as is consistent with the conveyance. So in this case there was no objection to the rent charge arising upon the life tenant's mortgaging the property, provided the rent charge was subject to the mortgage; and as the bankruptcy found the rent charge already existing, the assignees took subject to it. There is nothing in the decision of this case inconsistent with *Phipps v. Ennismore*.

§ 98. In *Knight v. Browne*, 30 L. J. Ch. 649; 7 Jur. N. S. 894; Wood, V. C., held that if A. by his marriage settlement settles property to the use of himself for life until he incumbers or sells it, and then for the benefit of his wife, for her separate use, the gift to the wife takes effect upon a mortgage by A. of his interest. He attempted to distinguish *Phipps v. Ennismore*, on the ground that the gift over was contained in a separate deed, though no such ground is taken by Lord Lyndhurst in his opinion,

and he said that the "very point in this case has been decided" in *Brooke v. Pearson*; but this, as appears by the preceding section, was not so. [The case of *Knight v. Browne* has been used as authority for the doctrine that a limitation over upon a creditor taking on process was good, *Re Detmold*, 40 Ch. D. 585, § 95, *ante*; but, as has been said *loc. cit.*, even if *Knight v. Browne* be good law, it is in truth no sufficient justification of *Re Detmold*.]

§ 99. A. settled his property on himself for life, or until he should become bankrupt or insolvent, and from his death, bankruptcy, or insolvency, in trust for his wife and children. A. became unable to pay his debts, and assigned all his property to trustees for the benefit of his creditors. It was held by the Lord Chancellor of Ireland, following *Phipps v. Ennismore*, and reversing the decision of the Master of the Rolls, that the trust for A.'s wife and children was void as against the assignees for creditors. *Casey's Trusts*, 3 Ir. Ch. 419; s. c. 4 Ir. Ch. 247, overruling the Court of Common Pleas for Ireland in *Gill v. Morgan*, Smythe, 60, and *Hall v. Cooper*, Id. 168. [*Casey's Trusts* was followed in *Clarke v. Chambers*, 8 Ir. Ch. 26. See *Re Callan's Estate*, 7 L. R. Ir. 102.]

§ 100. The text-books generally assume that the law is settled in accordance with *Knight v. Browne*, 2 Jarm. Wills (5th ed.), 378, note *e*; Lewin on Trusts (9th ed.), 108. But there is no greater weight of authority for that view than for the opposite. [The case is not so strong against purchasers in general, as against creditors in general; for purchasers would usually have actual or constructive notice of such limitations over on alienation, or, not having such notice, would not be bound by them, at least where, as in the United States, a registry system prevails. But

may it not be fairly considered contrary to public policy for a man to “be allowed to covenant that if he sells his estate the purchaser shall not have it?”]

D.

ESTATES FOR YEARS.

§ 101. [In 21 Hen. VI. 33, pl. 21, it was moved before the judges of the Common Pleas whether a condition not to alien attached to a lease for years was good, and three judges against one held it good. See Stath. Ab. Condition, 16 Hen. VI.] Since that time the validity of such a condition seems to have been assumed [8 Hen. VII. 10; 21 Hen. VII. 11;] Dyer, 6, 45, 66, 79, 152; and there is no doubt of its legality. It is also settled that the forfeiture may take place on involuntary alienation, e. g. bankruptcy. *Roe v. Galliers*, 2 T. R. 133. See *Doe d. Mitchinson v. Carter*, 8 T. R. 57, 300. A condition that executors should not assign was held valid in *Roe v. Harrison*, 2 T. R. 425, but such a condition does not apply to executors unless they are specially mentioned, *Seers v. Hind*, 1 Ves. Jr. 294. There are numerous cases on the construction of conditions against assignment, viz. to what persons and to what modes of alienation they extend; but these cases do not touch the question of the validity of the conditions.¹

¹ There are often provisions in leases for years, that upon default, in some matter, of the lessee, the lease shall be void. Such a provision, however expressed, will be construed a condition, making the lease voidable at the option of the lessor, and not a limitation making it absolutely void. The cases have generally arisen upon default in payment of rent, but the same rule must prevail upon breach of a covenant to assign. It was at one time supposed that the rule extended only so far as to prevent the lessee taking advantage of his own wrong, and that the lessor might regard the

§ 102. If a lessee for years transfers his whole interest, he cannot put any condition against alienation in the assignment. There is no tenure between him and his assignee. It is like the transfer of a fee simple or of a chattel personal. Co. Lit. 223 *a*. See § 27, *ante*.

§ 103. In *Roe v. Galliers*, 2 T. R. 133, 140, Mr. Justice Buller, speaking of a condition against alienation on a term for years, says, "If such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, and would be open to the objection of creating a perpetuity." See 4 Property Lawyer, 297, 298. But admitting that the Rule against Perpetuities applies to conditions at all, (which is not generally conceded in America,) the interest of the reversioner is a vested interest, and therefore not within the rule. [Cf. *Pollock v. Booth*, Ir. R. 9 Eq. 229, 607.] This seems, however, an eminently fit case for the intervention of legislation. In Alabama, the Code (1867), § 1581, Rev. Code (1876), § 2190, provides that "No leasehold estate can be created for a longer term than twenty years."

lease as void, although he had received rent after the breach, which would be a waiver of a condition. But the contrary is now held. *Davenport v. The Queen*, 3 Ap. Cas. 115, 128-130. And see *Iide v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Banks*, 4 B. & Ald. 401; *Arnsby v. Woodward*, 6 B. & C. 519, 523; *Roberts v. Davey*, 4 B. & Ad. 664; *Doe d. Nash v. Birch*, 1 M. & W. 402, 406, 408; *Bowser v. Colby*, 1 Hare, 109, 128-132; *Jones v. Carter*, 15 M. & W. 718, 725; *Hughes v. Palmer*, 19 C. B. N. S. 393, 405; *Attorney-General of Victoria v. Eltershank*, L. R. 6 P. C. 354, 368; [*James v. Young*, 27 Ch. D. 652;] 1 Wms. Saund. 287, *d*, note *u*; 1 Sm. L. C. (9th ed.), *Dumpon's Case*, 54-57.

II.

RESTRAINTS ON ALIENATION.

§ 104. AFTER those cases in which attempts have been made to punish alienation by forfeiture, there now come the cases in which, by obliging the holder of property to keep it in spite of his own wishes or those of his creditors, it is sought, not to punish, but to prevent alienation.

A.

ESTATES IN FEE SIMPLE.

§ 105. As in the English law a gift over upon alienation by tenant in fee simple, or one having the absolute interest in personalty, is void, so *a fortiori* any provision that such tenant or owner shall be seised or possessed of property in spite of himself, that is, any provision against alienation, is void. [*Hood v. Oglander*, 34 Beav. 513. *Re Bourke's Trusts*, 27 L. R. Ir. 573. See *O'Callaghan v. Swan*, 13 Vict. L. R. 676. So it has been held that a direction accompanying a devise in fee simple not to sell out of the family is invalid, *Attwater v. Attwater*, 18 Beav. 330, see §§ 31 *et seqq.*, *ante*; and so also a prohibition not to sell

for twenty years land devised in fee simple. *Renaud v. Tourangeau*, L. R. 2 P. C. 4, 18, see §§ 45 *et seqq.*, *ante*.] It is immaterial whether the property be legal or equitable. And when the fee or absolute property in land or chattels is given to A., and there is a direction not to convey to him till he reaches a certain age, say thirty, but no other person has in any event any interest either in the principal or income, the direction to postpone is disregarded, and A. is entitled to a conveyance at once. He has an indefeasible fee or absolute interest, which he can sell or mortgage, and it is deemed against public policy to deprive an adult sane man or unmarried woman of the use of land or goods in which he or she has an absolute and indefeasible property. So if one entitled to be paid the rents and profits for life, as *cestui que trust*, purchases the reversion, he can call on the trustees for a conveyance of the estate. The cases will be examined.

§ 106. *Piercy v. Roberts*, 1 Myl. & K. 4. Bequest to executors of £400 upon trust, to pay, apply, and dispose thereof, and of the interest and produce thereof, to and for the sole use and benefit of the testator's son Thomas, in such smaller or larger portions, at such time or times, immediate or remote, and in such way or manner, as the executors should in their judgment and discretion think best, and in case of the death of Thomas before the whole of the £400, and the interest thereof, should have been paid or applied for the purposes aforesaid, then the unapplied part to sink into the residue. Thomas became bankrupt. It was held by Sir John Leach, M. R., that Thomas's assignees were entitled to the £400. It is to be observed that the direction that the unapplied portion should sink into the residue does not seem to have been regarded as

being such a gift over as entitled the residuary legatee to object to the assignees taking the fund. Perhaps such direction was deemed inoperative within the cases in § 58, *ante*. See *In re Coe's Trusts*, 4 K. & J. 199.¹

§ 106 *a*. [*Sadler v. Pratt*, 5 Sim. 632. Under an exclusive power to appoint to children, at such ages or times, and under such provisos and dispositions, as the donee might appoint, the donee appointed to the children, and directed that they should receive their respective shares at the age of twenty-five. It was held that this direction was void.]

§ 107. *Josselyn v. Josselyn*, 9 Sim. 63. Bequest of residue of personalty to J., and direction to executors to put it out on security, the interest to be put out in like manner so as to accumulate, and the principal to be paid to J. when he reached twenty-four. There was a gift over in case J. died under twenty-one. Shadwell, V. C., held that on reaching twenty-one J. was entitled to a conveyance of the property. See *Jackson v. Majoribanks*, 12 Sim. 93.

§ 108. *Saunders v. Vautier*, 4 Beav. 115; s. c. Cr. & Ph. 240. Bequest of stock to trustees on trust to accumulate the interest and dividends until V. should attain

¹ *In re Landon's Trusts*, 40 L. J. Ch. 370. A testator directed his trustees to set apart £1000, and either to pay the same to his son, or to apply it for his benefit, or to invest it and pay or apply the income thereof "for his benefit, or otherwise as the trustees or trustee should, in their or his uncontrolled discretion, think fit." The trustees had paid the money into court under the Trustees Relief Act. The son became bankrupt. The assignees presented a petition for payment of the £1000 to them. The trustees were desirous to exercise the discretion given to them by the testator. Lord Romilly, M. R., ordered the money paid out to the trustees, holding that they had not lost their right to exercise the discretion. Here the trustees had a discretion to give the income away from the son.

twenty-five, and then to pay the principal with the accumulations to V. Held by Lord Langdale, M. R., and on appeal by Lord Cottenham, C., that V. was entitled to have the stock and accumulations transferred to him on coming of age. See *Curtis v. Lukin*, 5 Beav. 147, 155, 156.

§ 109. *Rocke v. Rocke*, 9 Beav. 66. A testator appointed his son residuary legatee, but added, "It is my especial desire that the residue of my property be not delivered over to him until the completion of his twenty-fifth year." Lord Langdale, M. R., held that the son was entitled to have the residue transferred to him on his reaching twenty-one.

§ 109 a. [*Swaffield v. Orton*, 1 DeG. & Sm. 326. The residue of a testator's personal estate was given to his grandchildren, with a direction that during the life of their mother, the income of their shares should accumulate in the hands of his executors. The direction was held invalid.]

§ 109 b. [*Peard v. Kekewich*, 15 Beav. 166. A. devised land to trustees in fee in trust for B. for life, remainder for such of B.'s children as B. should appoint. B. by will appointed to trustees in trust for his son C. and his heirs, and to be conveyed and assured to him when he should attain twenty-three. He directed the trustees to pay certain sums for the maintenance of C., and, subject thereto, directed them to accumulate the rents until C. or his other sons should first attain twenty-three, and then to pay over the accumulations to C. or such other sons as should first live to attain that age. C. had been born in A.'s lifetime. Sir John Romilly, M. R., held the direction to accumulate the rents until C. reached twenty-three to

be valid. It does not seem possible to support this decision. C. was entitled to the accumulations (he having in fact reached twenty-one) unless the other sons had a possible interest therein; but they had no such interest, for the direction to pay over the accumulations, at least so far as they were concerned, was void for remoteness, for it does not appear that they were born in A.'s lifetime.]

§ 110. *Re Young's Settlement*, 18 Beav. 199. Devise of realty and personalty to trustees upon trust, among other things, to sell and invest, and to pay one third to the testator's daughter, not to be payable till twenty-five, but to be vested at twenty-one. Lord Romilly, M. R., held that the daughter was entitled, on reaching twenty-one, to have her share paid to her.

§ 111. *Gosling v. Gosling*, H. R. V. Johns. 265. A direction that no devisee should be put in possession of the testator's estate, or enjoy the rents or profits of any property left by him, until reaching twenty-five, the rents and profits meantime to accumulate, was held inoperative. Sir W. P. Wood, V. C., said (p. 272): "The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age; unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his

devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, — or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, — the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.”

§ 111 *a*. [*Corentry v. Corentry*, 2 Dr. & Sm. 470. A testator devised land on a trust to accumulate the income until 1875, and directed that then it should form part of his residuary estate. This residuary estate he devised to several persons. He died in 1863. It was held that the residuary legatees were entitled to their shares at once, notwithstanding the accumulation clause.]

§ 111 *b*. *Re Jacob's Will*, 29 Beav. 402. A residue was bequeathed to the testator's four sons equally, the capital not to be divided until they were all settled in life; the interest of their portions alone to be paid after they were all provided for, until they severally became thirty years old, when the capital was to be placed at their disposal. Held, that each son was entitled to his share of the capital on reaching twenty-one. See *Pearson v. Dolman*, L. R. 3 Eq. 315.

§ 112. *Magrath v. Morehead*, L. R. 12 Eq. 491. Property was devised to a daughter, “to be settled on her at marriage.” The daughter reached twenty-one, and was unmarried. Held, that she was entitled to the property. [See also *Snow v. Poulden*, 1 Keen, 186; *Hilton v. Hilton*, L. R. 14 Eq. 468, 475; *Talbot v. Jevvers*, L. R. 20 Eq.

255; *Gott v. Nairne*, 3 Ch. D. 278; *Weatherall v. Thornburgh*, 8 Ch. Div. 261; *Re Cameron*, 26 Ch. Div. 19; *Re Fitzgerald's Settlement*, 37 Ch. Div. 18; *Re Parry*, 60 L. T. N. S. 489; *Lazarus v. Lazarus*, 14 Vict. L. R. 806, *n.*; *Higginbotham v. Barrett*, 15 Vict. L. R. 803; *Miller's Trustees v. Miller*, 18 R. 30; *Cuthbert, &c.*, 31 Sc. L. Rep. 575; 6 Jurid. Rev. 181.¹]

§ 112 *a*. The invalidity of provisions postponing the payment of the principal of a fund in which a devisee has an immediate absolute interest, is shown by the numerous cases in which such postponement beyond the limit fixed by the Rule against Perpetuities has not deprived the devisee of the right to have the principal paid him, if he has an absolute interest in the fund within the required time; or, in other words, the devisee is considered as acquiring, within the required limits, all the rights to the property, and the postponement of the right to payment of the principal is deemed void. If the postponement of the right to the principal were valid, then that right could never be enjoyed by the devisee, for it would be bad for remoteness. [The cases are given, Gray, Rule against Perp. § 121. See also *Oddie v. Brown*, 4 DeG. & J. 179; *Re Bevan's Trusts*, 34 Ch. D. 716. Cf. Gray, Rule against Perp. § 638.]

¹ [In *Havelock v. Havelock*, 17 Ch. D. 807, Malins, V. C., allowed accumulations to be broken into in order to furnish maintenance to infants who were only contingently entitled; and this was followed in *Re Collins*, 32 Ch. D. 229; and *Re Higginbotham*, 4 Vict. L. R. Eq. 57. But in the like case of *Re Alford*, 32 Ch. D. 383, maintenance was not allowed. And see *Re Smeed*, 54 L. T. N. S. 929; *Re Colgan*, 19 Ch. D. 305. In *Kemmis v. Kemmis*, 13 L. R. Ir. 372, *Havelock v. Havelock* was disapproved and not followed; and this decision was confirmed on appeal, 15 L. R. Ir. 90, where the earlier authorities are collected and discussed. The Irish case seems to be the sounder law. See Lewin, *Trusts* (9th ed.), 661.]

§ 112 *b*. [In England advowsons have sometimes been given to trustees for the benefit of a parish or to appoint clergymen of particular opinions. A sale of these advowsons would be a breach of trust on the part of the trustees, as there are no definite *cestuis que trust* who can consent to it. They are therefore inalienable. Such trusts have, however, been held good, though there is certainly difficulty in considering them as charitable (see Lewis, Perp. 693-708, and cases there cited), and it would seem to be only as charities that they can be sustained. *Attorney-General v. Webster*, L. R. 20 Eq. 483, 491. *Re St. Stephen*, 39 Ch. D. 492, 504. See *Carter v. Cropley*, 8 DeG. M. & G. 680; *Gott v. Nairne*, 3 Ch. D. 278; Marsden, Perp. 309-311; Lewin, Trusts (9th ed.), 86, 87; Gray, Rule against Perp. § 627.]

§ 112 *c*. [Whether a direction to accumulate the income of a fund devoted to charity is entirely void, and if not entirely void, to what extent it can be sustained is not clear. It is, of course, plain that, if such direction be void, the only result will be that the income will be immediately applicable for charity; the heirs or next of kin of the founder will not be let in, Gray, Rule against Perp. § 678; and as no one is interested in raising adversely to the charity the question of the invalidity of such direction to accumulate, the point is not likely often to come up. In *Harbin v. Masterman*, L. R. 12 Eq. 559, Sir John Wickens, V. C., held that such direction was not in itself void in the case of a charity, and his decision was followed in *Biddle's Appeal*, 12 W. N. C. (Pa.) 231, reversing s. c. *sub nom. Derbyshire's Estate*, 11 W. N. C. (Pa.) 22. See *Williston Seminary v. County Commissioners*, 147 Mass. 427; *Curran's Appeal*, 4 Pennyp. 331; Gray, Rule against Perp.

§ 679. But it seems hardly consistent with any sound view of public policy to allow accumulations for charities to go on without limit. And see now § 296 *c*, *post*.]

§ 113. Turning now to the American authorities, we find the law as well settled here as in England, that any direction that a legal fee or a legal absolute interest in personalty shall be inalienable, or free from debts, is void. *Blackstone Bank v. Davis*, 21 Pick. 42. [*Murray v. Green*, 64 Cal. 363. *Turner v. Hollowell Sav. Inst.* 76 Me. 527. *Gleason v. Fayerweather*, 4 Gray, 348. *Lane v. Lane*, 8 Allen, 350. *Oxley v. Lane*, 35 N. Y. 340. *Lovett v. Kingsland*, 44 Barb. 560; s. c. *sub nom. Lovett v. Gillender*, 35 N. Y. 617. *Williams v. Leech*, 28 Pa. 89. *Jaureche v. Proctor*, 48 Pa. 466. *Kepple's Appeal*, 53 Pa. 211. *Conrow's Appeal*, 3 Pennyp. 356. *McIntyre v. McIntyre*, 123 Pa. 329. *Carradine v. Carradine*, 33 Miss. 698. *Re Traynor & Keith*, 15 Ont. 469. See *Potter v. Couch*, 141 U. S. 296, 317; *Todd v. Sawyer*, 147 Mass. 570; *Dorland v. Dorland*, 2 Barb. 63, 81; *Philadelphia v. Girard*, 45 Pa. 9, 27; *Cooper's Estate*, 9 Penn. C. C. 600; s. c. 28 W. N. C. (Pa.) 134; *Jasper v. Maxwell*, 1 Dev. Eq. 357; *Smith v. Dunwoody*, 19 Ga. 237; *Steib v. Whitehead*, 111 Ill. 247, 251. The American cases on restraints upon alienation limited as to persons or as to time are given and discussed in connection with the cases on conditions upon alienation so limited, §§ 40-44, 52-54, *ante*, and it is also important to observe that in almost all the cases cited in the present section, the restraint upon alienation, which it was attempted to impose, did not extend beyond the life of the first grantee or devisee. Cf., however, *Hodgdon v. Clark*, 84 Me. 314, § 296 *a*, *post*.]

§ 114. Equitable fees and absolute interests can be alien-

ated, and by proper proceedings can be subjected to the payment of debts, like legal estates. Thus, if property is given to trustees to hold for A. until he reaches twenty-six, and then pay it to him, and A. becomes bankrupt before he is twenty-six, his assignee in bankruptcy is at once entitled to the property. *Sanford v. Lackland*, 2 Dill. 6. And if property is given to trustees for the use and support of A., A.'s interest is alienable and subject to his debts. *Sparhawk v. Cloon*, 125 Mass. 263.

§ 114 a. [A testator gave property to his nephews and nieces, the nieces' shares to be held in trust for them for twenty-five years from his death, the income to be paid to them, and, at the end of the time, the capital to be paid to them, with gifts over in case of their death before the end of the time. The court held that the gifts over were too remote; it was then urged that the trust should be upheld in order to restrain the nieces from alienating their interest during the twenty-five years. But the court said that this was not the trust created by the testator, and that if such was his intention it could not be carried into effect. "Having, by these provisions of his will, so far as they are legal, given an absolute estate to his nieces, no other person having any interest in it, a restriction upon their power of alienation is inconsistent and repugnant, and cannot be sustained." *Sears v. Putnam*, 102 Mass. 5, 9. A testator directed that when his son should be twenty-one years old \$4,000 should be paid to him annually, when he should be twenty-six years old, \$5,000 annually, and when he should be thirty years old, \$10,000 annually. The whole of the residue came to the son under a resulting trust. The court said it could not be doubted that the son took under the will an equitable estate which he might

alienate, and which equity would apply for his debts, and it ordered the principal of the fund which had been set aside to meet this annuity to be paid to him. *Sears v. Choate*, 146 Mass. 395. A proviso attached to an equitable fee that it should not be alienated as long as A. and his heirs owned certain other land is bad. *Winsor v. Mills*, 157 Mass. 362. See also *Thorndike v. Loring*, 15 Gray, 391, and *Fosdick v. Fosdick*, 6 Allen, 41, commented on in Gray, Rule against Perp. § 242. In *Gerard v. Buckley*, 137 Mass. 475, it would seem that only a question of the legal title was involved. See also *Weatherhead v. Stoddard*, 58 Vt. 623, 630, 631.¹

§ 115. So provisions that equitable interests in fee shall not be liable for the debts of the *cestuis que trust* are inoperative. *Taylor v. Harwell*, 65 Ala. 1. *Turley v. Massengill*, 7 Lea, 353. And so it has been held that a *cestui que trust* can demand a conveyance from the trustee under a will, although the testator has directed that the property shall not be liable for the *cestui que trust's* debts. *Gray v. Obear*, 54 Ga. 231. But see s. c. 59 Ga. 675. It is to be specially observed that even in Pennsylvania, the mother of so-called spendthrift trusts, that is, trusts giving inalienable equitable life estates, inalienable equitable fees are not allowed. Thus, where there was a devise to trustees and their heirs in trust for A. and his heirs, with a direction that the land should not be liable to be sold for the pay-

¹ [Procedure by garnishment, or, as it is commonly called in New England, trustee process, is not, however, an appropriate mode of reaching every equitable interest. *Carson v. Carson*, 6 All. 397. *Banfield v. Wiggin*, 58 N. H. 155. *Chase v. Currier*, 63 N. H. 90. *White v. White*, 30 Vt. 338. *White v. Jenkins*, 16 Mass. 62. *Hinckley v. Williams*, 1 Cush. 490. *Mellvaine v. Lancaster*, 42 Mo. 96. Drake, Attachm. (7th ed.) § 454 & See §§ 171-173, *post*. Cf. §§ 124 *e*, 124 *f*, *post*.]

ment of any of A.'s debts, past or future, it was held that A. was entitled to a conveyance from the trustees. *Keyser's Appeal*, 57 Pa. 236. [*House v. Spear*, 1 W. N. C. (Pa.) 34. But see §§ 124 a-124 k, *post*.]

§ 116. Although trustees have a discretion as to the time, mode, or amounts in which a trust fund is to be applied for the *cestui que trust*, yet if no one else has any interest in the fund it can be taken for his debts. Thus, where property was given to trustees to "apply the proceeds to the maintenance of A.," but not to be subject to his debts, it was held by the Supreme Court of North Carolina, in an excellent opinion, that a judgment creditor could reach the property on a bill in equity. *Mebane v. Mebane*, 4 Ired. Eq. 131. [A testator gave bank stock to a trustee for the benefit of his heirs, and directed that the trustee should, for twenty years, receive the dividends only, and should not dispose of the principal. It was held that the adult *cestuis que trust* were entitled to have the stock conveyed to them. *Turnage v. Greene*, 2 Jones, Eq. 63. In view of these cases, but slight weight can be attributed to the language in *Battle v. Petway*, 5 Ired. 576, 578. But see *Mouroe v. Trenholm*, 112 N. C. 634; s. c. 114 N. C. 590; § 124 s, *post*. And where the testator had directed that the residue of his estate should be appropriated by his executors to the relief of his heirs, "if they at any time shall need pecuniary assistance," on the request of the heirs, the executors, who made no objection, were directed to transfer the residue to the heirs. *Smith v. Harrington*, 4 Allen, 566. The court say: "The principle is simply this, that where property is given, granted, or bequeathed to certain individuals to be used, appropriated, and applied for their benefit, and in such manner that no other person or per-

sons have or can have any interest in it, they thereby become in effect the absolute owners of it, and may exercise all the rights belonging to them in that relation.”¹] So where property was given to one Healy in trust “for the benefit of my son Joshua, and to be paid to him in small sums, for the support of himself and family, or otherwise, as said Healy shall decide, or for a home to be kept in trust for said Joshua,” it was held by the Supreme Court of New York that the property could be reached by judgment creditors, the provisions of the New York statutes (see § 281, *post*) as to the inalienability of trust estates applying only to life interests. *Havens v. Healy*, 15 Barb. 296. [But as the New York Revised Statutes, Part 2, c. 1, tit. 2, art. 2, § 63 provide that “no person beneficially interested in a trust for the receipt of the rents and profits of land can assign or in any manner dispose of such interest,” and as the courts have held that this provision is to be extended to personal property, §§ 281, 286, *post*, an equitable life tenant who has acquired the whole interest cannot, in New York, demand a conveyance from the trustee. *Lent v. Howard*, 89 N. Y. 169. See *Asche v. Asche*, 47 Hun, 285; s. c. 113 N. Y. 232.] So where a testator directed that the property devised to his children should “remain in the hands of my executors, to be disposed of as they may think best for them and their heirs,” it was held that a child had an equitable fee which was subject to his debts. *Samuel v. Ellis*, 12 B. Monr. 479. [*Marshall v. Rash*, 87 Ky. 116.] And see *Taylor v. Harwell*, 65 Ala. 1.

¹ [In the previous edition reference was here made to *Danields v. Eldredge*, 125 Mass. 356, but on re-examination the case does not seem to be in point.]

§ 117. In *Smith v. Moore*, 37 Ala. 327, money was bequeathed to a trustee in trust for the testator's son William, "not subject to any debt or debts he may have contracted, but for his comfort and support; and should he depart this life before receiving the same, then, and in that event," the money to go to the testator's other children. It was held that the entire sum was liable for William's debts. The court seem to have treated the limitation over of what might remain as void. See § 58, *ante*.

§ 118. In *Flournoy v. Johnson*, 7 B. Monr. 693, there was a devise in trust for the benefit of W. and his family. It was held that W.'s interest could be reached in equity. See § 204, *post*. For the method to be adopted for distinguishing the share of A. from that of his family, see p. 696, and see also § 176, note, *post*. See further *Davidson v. Kemper*, 79 Ky. 5; § 210, *post*. Although *Slade v. Patten*, 68 Me. 330, is demonstrably erroneous, except on the supposition that the court thought an equitable fee inalienable, they probably had no such idea. See 14 Am. Law Rev. 237. Cf. *Pennsylvania Co. v. Price*, 7 Phil. 465. [See Gray, Rule against Perp. §§ 237, 237 *a*.] The case of *Cooper v. Cooper*, 36 N. J. Eq. 121, is so imperfectly reported, that it is impossible to tell what it decided, or whether the defendant was considered as having an equitable fee or an equitable life estate.

§ 119. Is there anything in the American reports in conflict with this great *consensus* of authority? There are two decisions, *Russell v. Grinnell*, 105 Mass. 425, and *Rhoads v. Rhoads*, 43 Ill. 239, and remarks in two other cases. [See now, however, §§ 124 *a*–124 *u*, *post*.]

§ 120. In *Russell v. Grinnell*, a testator gave \$4,000 to trustees to be held by them in trust for the use and sup-

port of the testator's sister. The sister was married at the testator's death, but her husband afterwards died, and she brought a bill to have the legacy paid to her. As appears from the briefs on file in the Social Law Library at Boston, the counsel for the trustees contended that the plaintiff had only a life interest, or at any rate that the residuary legatees had a right to what might remain undisposed of at her death; they evidently thought it idle to contend that an absolute interest, in which no other person was interested, could be detained from her. The counsel for the plaintiff cited none of the cases, English or American, bearing on the real point in question. The opinion is as follows: "CHAPMAN, C. J. The bequests in trust gave large discretionary power to the trustees. They might apply not only the income, but so much of the principal as they might think proper, to the use and support of the *cestui que trust*, and they were not limited to any particular methods of making the application. In the exercise of a reasonable discretion they had power to terminate the trust, if they thought proper; and in the exercise of the same discretion they may continue to hold the property not yet expended. They do not seek instructions from the court as to their duty, and the plaintiffs have no right to do so. Bill dismissed, with costs." It does not clearly appear whether the court thought that the trustees had a discretion to keep some of the money for the residuary legatees. (See *Sparhawk v. Cloon*, 125 Mass. 263, and § 240 *a, post.*) Even if the sister had an absolute interest, it is conceived that this case, argued and decided, as it was, without the consideration of the authorities, cannot weigh against the contrary decisions. [But see, now, *Claffin v. Claffin*, 149 Mass. 19, §§ 124 *l*-124 *p, post.*]

§ 121. But even if a trustee can assert his discretion against a *cestui que trust*, who has the entire equitable interest, it would be going a step farther to say that he can assert it against the creditor of such *cestui que trust*. There is no case in support of such a proposition. [See now, however, §§ 124 *a*-124 *u*, *post*.] There are two *dicta* sometimes cited for it. In *White v. White*, 30 Vt. 338, a legacy to A. "for the support of himself and his family, and for no other purpose," was paid to A.'s attorney, and was attached in the attorney's hands for a debt of A. It was held that it was affected with a trust for the benefit of A.'s family, and could not therefore be attached for his debts; but Bennett, J., who delivered the opinion, added, "For one, I should apprehend, if a legacy is given to a son for his support and for no other purpose, a trust would be created, and that the property would be held subject to the trust." What is meant is that such a provision would prevent the legacy being garnished for the son's debts. That is merely a question of local practice. There is no reason to suppose the legacy could not be reached in equity by a creditor of the son. See § 212, *post*.

§ 122. In *Braman v. Stiles*, 2 Pick. 460, a testator devised his property to his children equally, but directed that the share of his son J. "shall be deposited by my executors in the hands of my sons L. and B., and be retained by them and dealt out to the said J. for his comfort and advantage, according to their best judgment and discretion." He gave his executor power to sell all his real estate. The share of J. in the real estate was attached by his creditors. Subsequently, the executor sold all the real estate under the power. Held that, whatever J.'s interest in the real estate was, it was divested by the sale under the power.

The decision was plain enough, but Parker, C. J., who gave the opinion, went on to say: "Nothing can be more clear than that the testator, by these words, intended that his sons L. and B. should be the trustees of J. as to everything which was the subject matter of this provision; and such intention was lawful, for he having the power of disposing of his property as he pleased, had a right to prevent it from going to the creditors of his son, or from being wasted by the son himself, if, as was probable, he had become incapable of taking care of property. Creditors have no right to complain; for unless such disposition can be made, without doubt, testators in like situations would give their property to their other children." It must be remembered that there was at that time no equity court in Massachusetts.

§ 123. It would be hardly worth while to dwell on this *dictum*, opposed as it is to an overwhelming weight of authority, were it not that it is frequently relied upon in support of the validity of "spendthrift trusts," i. e. trusts creating inalienable equitable life interests. And in estimating the importance to be attached to it, it is to be observed that it does not allege that equitable life estates may be freed from debts, but that equitable fees may be, — a proposition absolutely without countenance elsewhere. For even the courts of Pennsylvania, the stoutest upholders of spendthrift trusts, fully recognize the invalidity of restrictions on fees, and are as orthodox on this point as Lord Eldon himself. See § 115, *ante*. [But see now §§ 124 a–124 k, *post*.] The extravagance of this *dictum* shows its ill-considered character, and deprives it of the weight it might have had, if limited to a proposition for which even a semblance of authority could be adduced.

§ 124. In *Rhoads v. Rhoads*, 43 Ill. 239, a testator directed that all his estate should be held by his executors in trust for fifteen years for the purpose of investing it in United States bonds; that the interest and all accumulations should be invested in the same way, so as to increase his estate as much as possible during the existence of the trust, for the benefit of his wife and children, with the distinct understanding that his executors should retain in their hands, at all times, sufficient means to provide for the proper support of his wife and her family, and for the education of his youngest children, the amount proper for such purposes to be left to their discretion; that his executors should pay at once \$5,000 to his son-in-law, if he should wish to go into business, to be charged against his wife, the testator's daughter; and that at the end of fifteen years from and after his death the trust thus created should cease, and all his estate be distributed among his wife and children in this manner, viz.: the sum of \$10,000 to be paid to his wife, to be held by her as absolute property; the remainder of his estate to be divided among his children according to the laws of the State, each child to be charged with such sums as had been or might be charged against them as advancements. The testator died in 1863, and his wife a few months after. Eight children survived him. In 1866, when five of the children were over age, the adult children brought a bill praying that their shares might be paid to them, and alleging that \$10,000 was enough for the support and education of the minors. The surviving executor answered, admitting that it would be enough. The Court dismissed the bill. Breese, J., who delivered the opinion, said that doctrines had been maintained by the counsel for the plaintiffs "requiring us to

look attentively and searchingly into the books cited as authority." "Counsel start with the proposition, that 'where moneys are to accumulate until the beneficiaries arrive at an age beyond adult age, they may have the fund on arrival at adult age, and that is settled beyond controversy.' The authorities to which he refers are Williams on Executors, 119; Lewis on Perpetuities, 528 to 531, and note *p*; *Saunders v. Vautier*, 4 Beav. 115, and s. c. in Craig & Phillips, 240, note 4, p. 248; *Josselyn v. Josselyn*, 9 Simons, 63; *Leeming v. Sherratt*, 2 Hare, 21, and note 1; *Rocke v. Rocke*, 9 Beavan, 66, and *Curtis v. Lukin*, 5 Id. 155." "We have looked into all the reported cases cited above which we have at command, and do not find any one of them supporting the broad doctrine insisted upon." The learned judge quotes Lewis on Perpetuities, 528, note (*p*), giving the statement of *Josselyn v. Josselyn* and *Saunders v. Vautier* there made. He then continues: "The author of the note insists that the true ground of the decisions in these cases is, that the legacies being vested at once, and there being merely a postponed enjoyment, without any gift over, in the event of the legatees not attaining such full enjoyment, the consequences of the right of property inevitably attached; one of which was, the power to assume an absolute control over, and therefore to demand a transfer of, the fund immediately on attaining majority; it being open to the legatee, either to allow the accumulations to proceed until his attainment of the age specified in the will, or (as the attainment of a particular age was not of the essence of the gift) to anticipate the accumulations by taking the fund into his own hands, immediately the law gave him the power of affecting or disposing of his property. And he says that this is the proper interpreta-

tion of the decisions in question, on one of the cases again coming before the court (4 Beavan, 115), is conclusively established by the observation of Lord Langdale to the effect that where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." The logical consequence would seem to be to grant the prayer of the bill, but the judge immediately adds: "We are at a loss to perceive the analogy between these cases (and the others cited are of the same character) and the one now before us," and why? "In this case we are not dealing with legacies, or with remainders or residuums of an estate, but are called upon to uphold or overthrow the scheme adopted by the testator for the disposal of his whole estate." "This case does not seem to have one single feature in common with the cases cited, or of any one of them." What are the two classes of cases between which the learned judge is "at a loss to perceive the analogy;" and which do "not seem to have one single feature in common"? The first is that of gifts of a residue; such was the case in *Josselyn v. Josselyn*, and *Rocke v. Rocke*: the second, that of gifts of the whole property; such was the case before the court. A. gives a legacy of \$1,000 or \$100 to X., and the residue of his estate, amounting to \$1,000,000, to his children when they reach twenty-five; the children, on the authority of *Josselyn v. Josselyn* and *Rocke v. Rocke*, are entitled to the property at once. B. gives no legacy at all, but gives his whole property to his children when they reach twenty-five; the children must wait till the prescribed age is reached;

because the judge is at a loss to see any analogy with the preceding case, and because the two do "not seem to have one single feature in common." A more futile distinction is not to be found in the books. Its statement is its best answer.¹

§ 124 a. [The recent decisions in Pennsylvania leave the present state of law there in some doubt. As has been said, § 115; *ante*, in *Keyser's Appeal*, 57 Pa. 236, the possibility of making equitable fees inalienable was denied, (and see *House v. Speur*, 1 W. N. C. (Pa.) 34; *Ward's Estate*, 16 Phil. 259; s. c. 13 W. N. C. 282, 283;) and in *Philadelphiu v. Girard*, 45 Pa. 9, 27, the doctrine of *Saunders v. Vautier* was referred to with approval. In *Henderson's Estate*, 15 Phil. 598, there was a trust to hold property seven years and then sell and distribute it to the *cestuis que trust*, but on the demand of some of the *cestuis que trust*, the trustee was ordered by the Orphans' Court of Philadelphia to distribute before the seven years had expired; and in *Cooper's Estate*, 150 Pa. 576, powers given to trustees were held not too remote, because "it was competent for all the parties in interest at any time to defeat the power and to take the property discharged thereof." p. 585.]

§ 124 b. [It is true that in *Hutchison's Appeal*, 82 Pa. 509; *Wilen's Appeal*, 105 Pa. 121; *Aubert's Appeal*, 119 Pa. 48, and *Cooper's Estate*, *ubi supra*, the Court refused to order a trustee to distribute to the owners of the entire equitable interest, but in each case the distribution was

¹ [The prayer of the bill in this case might have been properly enough refused on the ground that only a part of the *cestuis que trust* desired that the trust should be terminated. But no such ground was taken by the Court.]

opposed by one or more of the *cestuis que trust*, and, as the Court justly remarks, half of the whole is not necessarily the same as the whole of the half of a trust fund.]

§ 124 c. [But in *Butler v. Butler*, 9 Phil. 269, where a fund had been given to be conveyed to A. on his reaching twenty-eight with gifts over which had failed, *Sharswood*, J., sitting in equity, said: "I am of the opinion that it was the evident intention of the testator that the plaintiff should not have possession and dominion over the principal of the estate until he arrived at the age of twenty-eight years, and that to carry this intention, which is certainly lawful, into effect, it is necessary to hold the trust created by him an active trust." And he refused therefore to order a conveyance to A. See *Penn. Co. v. Price*, 7 Phil. 465, 469.]

§ 124 d. [*Hinkle's Appeal*, 116 Pa. 490, is very blindly reported. The facts have to be picked out from various parts of the report. It would seem that a trustee under a will held property in trust to pay the income to A. for life, and on his death to convey the principal to B., C., and D., and that A. transferred his interest to B., C., and D. The court refused to order a conveyance to B., C., and D. It said: "He [A.] is entitled, by the terms of the will, to the interest of the money during his life. His transfer of that right to his children [B., C., and D.] entitles them to receive the interest, but not to demand the principal until it becomes due and payable. The auditor does not find that the money was awarded directly to the children by agreement of all parties. The father and children so agreed, but there is no evidence of such agreement by the proper custodian of the money during the life of the father." There was no restraint imposed by the will on the alienation of A.'s life estate. On the statement above given, the

decision seems so clearly wrong that great doubt is felt by the writer whether that statement is correct.]

§ 124 *e*. [In *Beck's Estate*, 133 Pa. 51, a testatrix gave to E. certain chattels and a share in the residue "expressly upon condition that they shall not be liable to be attached or seized for the debts or moneys which said E. may owe at the time of my decease, but that the whole amount of her share shall be paid directly to said E. by my executor, without diminution for the payment of her said indebtedness." H. having a judgment against E. issued thereon an attachment execution, which was served upon E., and upon the executor of the testatrix as garnishee. The court held that, notwithstanding the attachment execution, payment must be made by the executor to E. *Keyser's Appeal*, 57 Pa. 236, § 115, *ante*, was apparently not called to the attention of the court.]

§ 124 *f*. [And in *Goe's Estate*, 146 Pa. 431, a testatrix devised and bequeathed all her estate, real and personal, to her children and added that it was her wish that none of said estate could be seized upon or levied upon for any debt or claim against any one of the children. An execution attachment on behalf of a creditor of one of the children was served upon the executor of the will. The Supreme Court held that the creditor could not reach the share of his debtor in the hands of the executor, saying that it thought the case was ruled by *Beck's Case*. It seems difficult to reconcile these last two cases with *Keyser's Appeal*, and leaves the law in Pennsylvania in a state of distressing uncertainty. Cf. § 114 *a*, *ante*; also *Ames v. Clarke*, 106 Mass. 573, § 239, *post*.]

§ 124 *g*. [Perhaps *Keyser's Appeal* and *House v. Spear*, 1 W. N. C. (Pa.) 34, may be reconciled with *Beck's Estate*

and *Goe's Estate* in the following manner. In Pennsylvania when a trustee has no duties to perform, the *cestui que trust* has, at once, not merely the equitable, but the legal title, and this not, by virtue of the Statute of Uses, in real estate only, but also in personal property. The direction, common in decrees made in suits touching such trusts, that the trustee shall convey is inserted, not as matter of necessity, but *ex abundanti cautela*. See § 215 and note, *post*. In *Keyser's Appeal*, the trustee had no duties, and so the *cestuis que trust* had at once the legal interest. (But see *Phillips's Appeal*, 2 W. N. C. (Pa.) 483.) This of course could not be made inalienable. See *Hahn v. Hutchinson*, 159 Pa. 133. But this doctrine has never been extended in Pennsylvania to executors. A legatee, either specific or pecuniary, has not the legal title. Until the executor assents to the legacy or pays it, the legal interest is in him, the interest of the legatee is equitable, and this equitable interest can be subjected to a valid restraint on alienation. This is *Beck's Estate*. If such be the true interpretation of the cases, the result is important. *Keyser's Appeal* would not decide, as it has been sometimes supposed it did, that an equitable fee cannot be subjected to a spendthrift trust, for in *Keyser's Appeal* the interest attached was not equitable but legal; and *Beck's Estate* and *Goe's Estate* would stand as uncontradicted authorities that equitable fees can be subjected to spendthrift trusts. On this view, if property were given to A., to employ it, principal and interest, for the support of B. at A.'s discretion, as the trustee would have active duties to perform, B.'s interest would be equitable, and his creditors could not reach it. It is certainly to be desired that the question may come before the Supreme Court of Pennsylvania

in such a form as to receive an authoritative decision on the true line of demarcation between the cases.]

§ 124 *h*. [*Barker's Estate*, 159 Pa. 518, is the latest utterance of the Pennsylvania courts on the subject. A testatrix appointed her husband her executor with power to take charge of her estate, real and personal, and dispose of it in his discretion, subject to the restrictions and conditions in her will, paying incumbrances and dividing the balance among the children; such distribution not to take place till the husband's death; until then, the income, or so much thereof as he might desire, to be applied to the support of himself and of such members of his family as might, in his discretion, require it. On any child becoming of age the husband was authorized, if he deemed it expedient, to bestow on such child the portion of the estate it would inherit on the husband's death. The testatrix also declared that if, in such bestowal, the husband should exceed the share which would otherwise have fallen to any child, he should not be liable to account to the other children. And she added: "It is my will in creating the foregoing trust for the maintenance and support of my husband and family that the same shall be enjoyed by him and them without being in any way subject to or liable for the debts or engagements of my said husband or any of our children." A son of the testatrix who had reached twenty-one, made an assignment for the benefit of his creditors; afterwards the husband made an advance to this son, and paid the money to him. Two women named respectively Anna B. Scott and Deborah W. Mellor objected to the allowance of this item in the executor's account. Why they should object or what they had to do with the case the report fails to disclose.]

§ 124 *i*. [In the Orphans' Court the auditing judge ruled that the children took vested interests when they reached twenty-one, but that the husband "had the right to bestow upon any of the children a sum greater or less than their respective shares. If he chose to exercise that option by giving to the children, other than the bankrupt, a sum so far in excess of their portions as should leave nothing to the debtor, the creditors would be powerless." The Orphans' Court affirmed the decision of the auditing judge. They say: "Where there is a present gift, in possession, of the entire beneficial ownership, a trust to protect against creditors is invalid: *Keyser's Appeal*, 57 Pa. 236; but the power of alienation may, unquestionably, be withheld in the case of a contingent interest before it vests, even in England: *Large's Case*, 2 Leon. 82; 3 Leon. 182; *Barnett v. Blake*, 2 Dr. & Sm. 177; and so it would seem in Pennsylvania in case of a vested interest, prior to its coming into possession, or where the restraint is confined to a limited period not transgressing the rule against perpetuities: *McWilliams v. Nisly*, 2 S. & R. 507, 513. See also *Jaureche v. Proctor*, 48 Pa. 472." The Court refer also to *Beck's Estate* and *Goe's Estate*, *ubi supra*. The Supreme Court affirmed the decision, saying that they did so on the reasons given in the opinion of the auditing judge.]

§ 124 *j*. [It does not seem entirely clear that the son did not have a legal interest, but, assuming that he had only an equitable interest, the ruling of the auditing judge appears to amount to this. If A., having an equitable vested interest in remainder in a trust fund after a life interest given to the trustee, assigns that interest, and the trustee waives his life estate and is ready to pay over A.'s interest at once, the trustee can ignore the assignment and

pay the money directly to A., *provided* he has power to appoint the fund away from A. This is the reasoning approved by the Supreme Court, but it seems open to some criticism. Suppose the trustee had died, and his successor is dividing the property, and has notice that A. has assigned his share, he would surely have to pay it to the assignee, and what difference can it make that the life tenant waives his interest and allows the vested interest in remainder to come into possession at once? and again, what difference can it make that the vested interest could have been divested by the exercise of a power if the power has not been exercised?]

§ 124 *k*. [The full bench of the Orphans' Court places the decision on another ground, viz.: that a future interest, though vested, can be put under a restraint against alienation if it has not come into possession; but this ground seems no more tenable than that taken by the auditing judge. It is doubtless true that a future contingent interest may be forfeited by alienation before vesting, § 46, *ante*; but that is a totally different proposition from saying that a contingent future interest shall not be assignable before vesting. Law and equity have always lent themselves to the easy destruction of contingent interests, but that is very different from watching over such interests so carefully as not to allow any one having a contingent future interest to get rid of it. But further, even a clause of forfeiture upon alienation is not held valid when attached to interests vested in interest though not in possession, §§ 47 *et seqq.*, *ante*. *McWilliams v. Nisly* and *Jaureteche v. Proctor* contain only *dicta*. *Barker's Estate* cannot be considered as having made the state of the law in Pennsylvania any clearer.]

§ 124 *l.* [*Claflin v. Claflin*, 149 Mass. 19, is the most complete and outspoken departure from the old law. A testator gave a share of the residue of his personal estate to trustees in trust to sell and dispose of the same, and to pay the proceeds to his son in the following manner: \$10,000 when he was twenty-one, \$10,000 when he was twenty-five, and the balance when he was thirty. The son having reached twenty-one, brought a bill in equity to have the whole share paid to him. The Court state the doctrine of the English cases *supra*, with great precision. They add that the son's interest is alienable by him, and can be taken by his creditors to pay his debts. But they say that since spendthrift trusts have been established in the law of Massachusetts by *Broadway Bank v. Adams*, 133 Mass. 170, restrictions on the fee such as the testator imposed in this case will be sustained. "The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this Court declined to follow the English rule in that case are applicable to this; and for the reasons there given, we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own."¹]

¹ [In *Gray*, Rule against Perp., § 120, note, attention had been called to the fact that by the introduction of spendthrift trusts in Pennsylvania

§ 124 *m*. [But even when a State Court has made up its mind to tolerate spendthrift trusts, there are some reasons, it is respectfully submitted, why the doctrine on which such trusts rest, whatever that may be, should not be extended to cases like *Claflin v. Claflin*. That the interest of the equitable owner can be alienated, voluntarily or involuntarily, the Court in that case declare. They add, "But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided." Let us consider both alternatives.]

124 *n*. [If a creditor or grantee can get immediate possession of the fund, the restraint is a mere form. The *cestui que trust* can, by the simple ceremony of making a deed of his interest to a third person, and taking a deed back, hold the property free from all fetters. If, on the other hand, the creditor or grantee can take possession of the property only at the time when the settlor or testator has directed, for example, when the *cestui que trust* reaches forty years, then any sale by or taking from the *cestui que trust* will be under circumstances highly disadvantageous to him. Property sold *in presenti*, but not to be delivered for many years, must be sold at a sacrifice, and when the seller is a person of the character for whom such restraints are supposed to be useful, the chances are that it will be sold at a very great sacrifice. In fact, the law, by sanctioning such restraints, is exposing inexperienced youth to those "catching bargains," against which the old-fashioned equity always strove to protect it.]

and Massachusetts the old boundaries had been effaced in those States, and that it was therefore impossible to say where the new ones would be set up, and whether and to what extent restraints would be allowed on the alienation of equitable fees. See also an article by A. H. Wellman, Esq., 18 Cent. L. J. 307.]

§ 124 *o*. [The law has fixed the age of legal responsibility at twenty-one ; if that is too young, let it be changed, but the wisdom of allowing individuals to change it at their pleasure is not clear. And, if paternalism is to be introduced into our law, its introduction in this particular class of cases seems to be without the advantages that may exist elsewhere, and to retain only its irritating and demoralizing features. The farther these novel doctrines are carried out, the greater seems the wisdom of the old law.]

§ 124 *p*. [The Court say, "We have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void, if the interest of the beneficiary is vested and absolute." But the distinction which the Court endeavor to establish between the case before it and *Sears v. Choute*, 146 Mass. 395, § 114 *a*, *ante*, will perhaps not be felt by the learned reader to be entirely satisfactory, and the attention of the Court appears not to have been called to *Sears v. Putnam*, 102 Mass. 5, § 114 *a*, *ante*. If the cases are all reconcilable, it is only by the establishment of subtle distinctions, the inevitable tendency of which to promote litigation is not the least of the objections to this new departure in the law.]

§ 124 *q*. [To complete the matter reference should be made to a *dictum* in *Buford v. Guthrie*, 14 Bush, 677, 686. The decision in *McKindrey v. Armstrong*, 10 Ont. Ap. 17, that a trustee who was given the option to pay money to A., or to buy a house and convey it to A., in fee, could not be garnisheed as owing a debt to A., seems correct. Patterson, J. A., said that he did not doubt that the *cestui que trust* could have elected to take the money, but that he had not

so elected, and that in the absence of a decision by the trustee or an election to take as money by the *cestui que trust*, no debt could be said to be due from the former to the latter. Cf. *Meek v. Briggs*, 37 Iowa, 610, § 296 *a, post.*]

§ 124 *r.* [If the courts of Illinois adopt the construction of the statutes of that State put upon them by the Supreme Court of the United States, an extraordinary, indeed unique, condition of things exists in that State. The case of *Steib v. Whitehead*, 111 Ill. 247 (1884), while sustaining the validity of spendthrift trusts of life interests, declared in the most emphatic manner that any restraints of alienation annexed to a fee simple were void, and in accordance with this, the Supreme Court of the United States, in *Potter v. Couch*, 141 U. S. 296, 315–318 (1891), held that any attempt to restrain the alienation of an equitable fee simple was inoperative. But the Illinois Rev. Sts. c. 22, § 49, enacts that when an execution is returned unsatisfied, the judgment creditor may file a bill in equity “to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from some person other than the defendant himself.” And the Supreme Court held, in *Potter v. Couch*, that under this statute, if property was given to A. in trust for B. and his heirs, B.’s interest could not be reached by his creditors. That is, all equitable fees and absolute interests in personalty can be alienated by the *cestui que trust* at his pleasure, but cannot be taken for his debts. This seems a monstrous result, but it is hard to see

what other construction can be put upon the statute. See §§ 240 *w*, 240 *x*, *post*.]

§ 124 *s*. [The case of *Monroe v. Trenholm*, 112 N. C. 634; s. c. 114 N. C. 590, is inexplicable. T. by deed, reciting his desire to secure to his wife E., and to her children, part of his real estate, conveyed land to S. and his heirs in trust for the sole use and benefit of E. and her heirs, and empowered S. at any time to dispose of the lands when required by E. T. died, and E. conveyed the land to M. and his heirs. M. brought a proceeding against S. to obtain a conveyance of the land. The Court below ordered the conveyance to be made, but the Supreme Court reversed the judgment, the counsel for M. not appearing. That Court would seem to have entirely overlooked the fact that E. was a widow when she made the conveyance to M., and to have considered the case as if the question were whether a *feme covert*, being a *cestui que trust*, under an instrument like the one in this case, could assign her interest. They held that she could not, and even this would seem wrong, for there was no clause against anticipation.]

§ 124 *t*. [The counsel for M. petitioned for a rehearing. The Court refused it. They say that the counsel for the petitioner "has established the proposition that, where property is limited in trust for a married woman for the sole purpose of preserving it from the marital rights and influence of the husband, the restrictions upon alienation become inoperative when the coverture ceases." The counsel, therefore, had called to the attention of the Court the fact that the *cestui que trust* was not now a married woman, yet all the Court say is, "but in view of the peculiar phraseology of this deed our conclusion is that the principle mentioned does not apply to this case."]

§ 124 *u.* [What the peculiar phraseology is, and why the principle mentioned does not apply to the case, the Court do not say. No phraseology, however peculiar, could render the interest of an equitable tenant in fee inalienable. Nowhere has this been more explicitly or better declared than in North Carolina. *Mebane v. Mebane*, 4 Ired. Eq. 131, § 116, *ante*. It is hard to resist the painful feeling that the Court made a blunder, and then did not like to acknowledge it, and put the counsel off with a vague phrase.]

§ 125. There is one exception to the invalidity of restraints on the alienation of fees or absolute interests. When, in the case of married women, the doctrines of separate use and restraint upon anticipation came into existence, the interests alienation of which it was sought to restrain were life interests.¹ It was only in *Baggett v. Meux*, 1 Coll. 138 (1844), that the question as to the validity of a clause against anticipation upon a gift of an absolute interest came up. In this case the legal estate in land was devised to a married woman in fee, for her separate use, with a direction that she should not sell or incumber it. She did incumber it. Vice-Chancellor Knight Bruce held that a restraint on anticipation by a married woman was equally valid upon a fee simple as upon a life estate; that the incumbrance was void; and that the deed attempting to create it should be delivered up. The decision was confirmed by Lord Lyndhurst, C., s. c. 1 Phil. 627. [So *Re Currey*, 32 Ch. D. 361. *Re Hutchings*, 58 L. T. N. S. 6.²] So also upon a gift to a married woman

¹ On life interests of married women, see §§ 269-277 *a, post*.

² [St. 44 & 45 Vict. c. 41 (Conveyancing and Law of Property Act, 1881),

of an equitable fee. *Wells v. McCull*, 64 Pa. 207. [*Gunn v. Brown*, 63 Md. 96. *Robinson v. Randolph*, 21 Fla. 629. *Monroe v. Trenholm*, 112 N. C. 634; s. c. 114 N. C. 590; §§ 124 s-124 u, *ante*. In those cases where a clause against anticipation by a *feme covert* upon a gift of a life estate would be invalid, see §§ 276-277 a, *post*, it will also *a fortiori* be invalid when attached to a gift of a fee simple.]

§ 125 a. [*Moses v. Micon*, 79 Ala. 564. Property was conveyed by deed to S. in trust to settle it on the wife and children of M. in such proportions as the trustee might consider fitting. The trustee never settled the property, though the income was paid to the wife and child of M. It was held that the trust was executory; that the trustee in executing the settlement could properly attach a provision against anticipation to the wife's interest; and that therefore the creditor of M.'s wife could not maintain a bill in equity to reach her interest in the land. See *Turner v. Sargent*, 17 Beav. 515; *Stanley v. Jackman*, 23 Beav. 450, 456; *Re Dunnill's Trusts*, 6 Ir. L. R. 322.]

§ 126. Does a restraint imposed upon the alienation of an estate in fee simple prevent any dealing at all with the estate by a married woman during her coverture, or, on the other hand, does it allow her to transfer the whole estate, subject to her right to receive the income during her life? [In *Baggett v. Meux*, *ubi supra*, the conveyance by the *feme covert* was declared wholly void, but there the wife had no power to convey at common law. Where, however, statutes empower a married woman to pass the

§ 39, authorizes the Court, with the consent of a married woman, to bind her interest in property which is subject to a clause against anticipation. *Re Tippet's & Newbould's Contract*, 37 Ch. Div. 444. See §§ 271 a, 296 a, *post*.]

legal title of land which she owns in fee, there is room for question whether a declaration that the property is to be held for her sole and separate use without power of anticipation will do more than restrain her from depriving herself of the income during coverture.] Such limited restraint seems to afford the married woman all the protection that is necessary; and as the allowance of the restraint upon anticipation is a recognized violation of the laws of property, introduced only for the personal benefit of married women, it may well be argued that there is no reason why such violation should be carried farther than is necessary for their personal benefit. The point does not seem to have been determined. See *Spring v. Pride*, 10 Jur. N. S. 646; *Cooper v. Macdonald*, 7 Ch. D. 288; § 133, *post*; [*Springer v. Savage*, 143 Ill. 301; *Mouroe v. Trenholm*, 112 N. C. 634; s. c. 114 N. C. 590, §§ 124 *s*—124 *u*, *ante*. Cf. also the following section; but see § 275 *a*, *post*.]

§ 126 *a*. [When property is given to A. for life, with a power of appointment by will, A. can, by deed, release the power. Farwell, Powers (2d ed.), 16. A husband conveyed land to trustees in trust to allow his wife to receive the rents during her life, for her separate use, without power of anticipation, and after her death to the use of such persons as she should by will appoint. The trustees afterwards, at the request of the wife, reconveyed the land to the husband. Chatterton, V. C., thought that this conveyance was inoperative both upon the life estate and the remainder in fee, but the Court of Appeal, while agreeing with the Vice Chancellor as to the life estate, thought that the wife could release the power, although it not being then necessary to decide that point, they made no decree upon it. *Heath v. Wickham*, 3 L. R. Ir. 376; s. c. 5 L. R.

Ir. 285. The language of Ball, C. (p. 295), has a bearing on the question referred to in the preceding section. He says that the effect of the clause against anticipation in a marriage settlement is "that the intended wife shall not anticipate or deprive *herself* of the power to call for the income as it becomes due. It is '*herself*' she is not to deprive of the income. . . . Its object is not to prevent the wife's disposal of her property under a power, but to prevent her from losing the personal enjoyment of it. It is her individual comforts that are in contemplation, and she is not prevented from doing an act which cannot take any personal benefit from her." See Farwell, 18, 19.]

§ 127. When the absolute interest in personal property is bequeathed to married women directly, and it is at the same time provided that they shall not anticipate it, how can this provision be enforced? If the property is in their hands, how are they to be restrained from dealing with it? In *Re Sykes's Trusts*, 2 J. & H. 415, before Sir W. P. Wood, V. C., a fund of £35,000 stock was appointed after the death of A., in trust to be divided between the daughters of the testator, so that the shares and income should be for their separate use, the receipts of the daughters to be discharges for their shares, and the daughters not to sell or incumber their shares or the income thereof. There were gifts over, in case any daughter died without issue within twenty-one years after A.'s death, to the surviving daughters. The daughters released their interests as survivors in each other's shares. One of the daughters, a married woman, conveyed her interest. A., the life tenant, afterwards died. It was held that the conveyance was void; and the court also ordered that the daughter's share should be paid to her. No question was made as to this last or-

der; the only point argued was whether the conveyance was good. There was an inconsistency in the language of the will. The receipt of the daughter for her share implied that it was to be transferred to her; and yet, if transferred to her, how could she be prevented from anticipating it? And again, the gifts over (although they were in fact released) showed the intention of the testatrix against the transfer to the daughter, for the existence of the gifts over would have required the holding of the property in trust, and prevented the transfer of the principal to the daughters. In *Re Ellis's Trusts*, L. R. 17 Eq. 409, 411, Sir George Jessel, M. R., doubted the correctness of the report in *Re Sykes's Trusts*. [The order made in that case seems inconsistent with *Re Bown*, 27 Ch. Div. 411, 416, 417. But the Court of Appeal in this last case, p. 422, approve of *Re Sykes's Trusts*, on the ground, *semble*, that the restraint on anticipation was to be considered as continuing only during the life of A.]

§ 128. In *Re Sarel*, 10 Jur. N. S. 876; S. C. 4 New Rep. 321, a testatrix gave to her married niece a legacy of £3,000 and also a share of the residue of her personal estate, and directed that any pecuniary legacy or share of her residuary estate given to any married niece should be paid into the proper hands of such niece, so as that the same should not be liable to the control of her husband, or be alienable by her or her husband, and that the receipt of said niece alone should be a sufficient discharge to the executors. The executor had paid the niece's share of the estate into court. Wood, V. C., held that the money must be retained in court, and only the income paid to the legatee during her coverture.

§ 129. In *Re Gaskell's Trusts*, 11 Jur. N. S. 780, a tes-

tator gave his real estate and the residue of his personal estate to trustees to make certain payments out of the rents and profits, and to retain the residue of the rents and profits till the death of his wife, and then to sell the real and personal estate and divide the proceeds between two married women, and he declared that the shares of each should be for her sole, separate and inalienable use and benefit, and that her receipts, whether she were married or single, should be a good discharge to the trustees. Wood, V. C., ordered the fund to be retained. See *Armitage v. Coates*, 35 Beav. 1.

§ 130. In *Re Ellis's Trusts*, L. R. 17 Eq. 409, £500 three per cent consolidated annuities were bequeathed to a married woman, for her separate use, without power of anticipation. Jessel, M. R., held that the legatee, during coverture, was entitled to the income only. He thought there was no difference between real estate and a fund producing income. He expressly abstained from giving an opinion as to what would be the law if the property was not producing income (p. 414).

§ 131. In *Re Croughton's Trusts*, 8 Ch. D. 460, the testatrix gave all her real and personal property to trustees in trust to convert the same into money, pay debts and legacies, and stand possessed of the residue of the trust moneys upon trust to invest the same in certain securities, and pay the income to her sister for life, and after her death upon trust to divide and pay the said residue of said trust moneys to her nephew and niece, the latter of whom was married. She declared that every gift to any woman was for her sole and separate use, and so that she should not have power to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise in the way of anticipation,

and that her receipt alone should be a discharge for the same. The testatrix's sister had died before her, and the residue of the estate had been ascertained, and was now standing, uninvested, in court. Bacon, V. C., held that the direction to invest was only for the benefit of the sister; that the gift to the nephew and niece were really of sums of money; and that the niece was entitled to be paid the principal.

§ 131 *a*. [The questions discussed in the foregoing five sections have come frequently before the English courts during the last few years, but it cannot be said that the result of the decisions is entirely clear. The following is ventured on as giving the present condition of the authorities.]

§ 131 *b*. [(1) When the settlor or testator shows an intention that the property shall continue in the hands of trustees, and there is a clause against anticipation, a married woman will not be entitled to have the property transferred to her, although her interest be absolute; that is, the courts will, in the case of a married woman, give that effect to the intention of the settlor or testator, which, on the ground of public policy, they refuse to give in the case of other persons. *Re Benton*, 19 Ch. D. 277. *Re Spencer*, 30 Ch. D. 183. *Re Grey's Settlements*, 34 Ch. Div. 85, 712. *Tippetts & Newbould's Contract*, 37 Ch. Div. 444. See *Re Bown*, 27 Ch. Div. 411; *Re Wood*, 61 L. T. N. S. 197.]

§ 131 *c*. [(2) When there is a direction to pay and divide moneys and securities, after an intervening life estate or other intervening interest, into the hands of a married woman, and that her receipt alone shall be sufficient discharge, the clause against anticipation will be considered

as meant to be confined to the continuance of the life or other interest, and as intended to restrain anticipation of the trust property only during that period. *Re Sykes's Trusts*, 2 J. & H. 415, § 127, *ante*. *Re Croughton's Trust*, 8 Ch. D. 460, § 131, *ante*. *Re Bown*, 27 Ch. Div. 811. *Re Holmes*, 67 L. T. N. S. 335. See *Re Hutchings*, 58 L. T. N. S. 6. The case of *Re Gaskell's Trusts*, 11 Jur. N. S. 780, § 129, *ante*, seems *contra*.]

§ 131 *d*. [In *Re Coombes*, Weekly Notes (1883), 169, a testator bequeathed £20,000 in trust to invest in certain securities, to pay the income to his wife for life, and, on her death, he gave "the aforesaid trust investments and income unto and equally between" certain persons, among whom were the petitioners, married women, and he directed that all benefits taken under his will by any married woman should be for her separate use, and, as to income, without power of anticipation. The money was uninvested at the death of the widow; part of it was afterwards invested. Bacon, V. C., ordered the shares of the petitioners to be transferred to them. In this case it is to be observed that there was a direct gift of trust investments, and not a direction to pay and divide; and that there was no provision about the married woman's receipt being a discharge; but that, on the other hand, the clause against anticipation was confined to income. These differences, taken together, do not seem sufficient to distinguish the case from those in the preceding paragraph, and the decision accordingly would appear to be correct.]

§ 131 *e*. [But although there is no occasion to quarrel with the decision in the case of *Re Coombes*, it can hardly stand on the ground upon which it was put by Bacon, V. C. Sir George Jessel, in *Re Ellis's Trusts*, L. R. 17 Eq. 409,

had made a suggestion, though without approving it, that there might be a difference between an income-producing fund and money, and that although, if there was a clause against anticipation, the former would not be transferred, the latter might be. The fact that the testator meant to give an income-bearing fund, or that he meant to give cash, might have a legitimate effect in determining what the intention of the testator was, and that was probably what Sir George Jessel had in mind. But to consider the accident of the condition in which the fund happened to be at the period of distribution, as was done by Vice Chancellor Bacon in *Re Coombes*, cannot be proper.]

§ 131 *f*. [This case of *Re Coombes* does not seem to have been much noticed in the later cases, but a decision to the same effect by Fry, J., in *Re Clarke's Trusts*, 21 Ch. D. 748, has been disapproved by the Court of Appeals in *Re Bown*, 27 Ch. Div. 411, and the notion that the condition of the property (except so far as it may indicate the testator's intentions) has any effect on the right of a married woman to receive it, may be said to be exploded. See Haynes, *Outlines of Eq.* (5th ed.) 168, note.]

§ 131 *g*. [(3) When there is an immediate gift to a married woman, and yet there is a clause against anticipation, what is to be done? Here are two irreconcilable provisions, and yet the settlor or testator was apparently unconscious of the inconsistency. In *Re Taber*, 51 L. J. N. S. Ch. 721, a testator bequeathed £20,000 to S., but if S. died in his lifetime, then to S.'s children. He gave another sum of £20,000 in trust to pay the income to K., who was one of S.'s two children, for life, with a gift over; and gave six annuities, of which five were to women. He also declared that every bequest made for the benefit of any

female during her coverture should be for her separate use, and without power of anticipation or alienation. S. died in the testator's lifetime. Bacon, V. C., held that K. was entitled to the half of the legacy to S. free from the restraint against anticipation. In this case there was certainly room for doubt whether the clause against anticipation was intended to apply to the substitutionary legacy to S.'s children, when there were several life interests to which it was appropriately applicable.]

§ 131 *h*. [If there is a simple gift of property, either of a particular security, *Re Ellis's Trusts*, 17 Ch. D. 409, or of a residue, *Re Currey*, 32 Ch. D. 361, with a clause against anticipation, and there is no direction that the property shall be paid or divided to the married woman, or that her sole receipt shall be a sufficient discharge, the married woman will not be entitled to have the property paid to her. It is intended that she shall have an inalienable interest; this cannot be effected by making her a trustee for herself, and therefore the fund is retained in court, or a trustee is appointed to take it. So too is *Re Clarke's Trusts*, 21 Ch. D. 748, where Fry, J., refused to allow shares forming part of a residue to be transferred to a married woman.]

§ 131 *i*. [It must be conceded, however, that there is language used by members of the Court of Appeals in *Re Bowen*, 27 Ch. Div. 411, which is hardly consistent with this view: "We must look at the intention of the testatrix, whether she has indicated an intention that the trustees are to keep the fund and pay the married woman the income" (p. 423).]

§ 131 *j*. [In *Re Sarel*, 10 Jur. N. S. 876, s. c. 4 New Rep. 321, § 128, *ante*, there was an immediate gift to a

married woman of a share of residuary personalty to be paid into her own hands, so as not to be alienable, and her receipt to be a discharge. The Court retained the money. Here, on the one hand, there was no intervening interest to the duration of which the restraint on alienation could be confined; while, on the other hand, there was no intervention of trustees, and there was a direction to pay into the married woman's own hands, and a provision that her discharge should be a receipt.]

§ 131 *k*. [In *Re Spencer*, 30 Ch. D. 183, a testator directed trustees to pay an annuity to his wife, and to accumulate the surplus income of his real and personal property during her life, and on her death he gave the capital with all accumulations to his children. He directed that any gift to a woman should be for her separate use, and without power of anticipation or alienation during the life of his wife. The children brought suit to determine whether they were not entitled, with the consent of the widow, to the present receipt and enjoyment of their shares. It was held, by Pearson, J., that the married daughters were not "entitled to receive any part of the capital, either of the original shares or of the accumulations, during the life of their mother. They can only receive the income of the securities in which the accumulations are invested." It does not seem to have been perceived that this case goes further than any other has yet done. Married women have been restrained from anticipating the income of property which they owned in fee, but never before this has an accumulation of such income been enforced against their will. See on the general subject *Devitt v. Fausssett*, 7 L. R. Ir. 511; s. c. 9 L. R. Ir. 84; 80 Law Times, 372; Lewin, Trusts (9th ed.), 890, 891; Godefroi, Trusts (2d ed.), 587, 588.]

B.

ESTATES IN FEE TAIL.

§ 132. As every condition against alienation or limitation over upon alienation annexed to an estate tail is destroyed by the barring of the estate tail by a common recovery, so, *a fortiori*, a recovery will bar any restraint against alienation attached to an estate tail. [*Re Colliton & Lander-gan*, 15 Ont. 471.]

§ 133. In *Cooper v. Macdonald*, 7 Ch. Div. 283, it was held that the tenant of an equitable estate tail, being a married woman and restrained from anticipating the rents, could bar the estate tail, but it was said that the restraint would attach upon the rents of the fee into which the estate was enlarged. Jessel, M. R., thought the decision would be the same, although the will had prohibited the alienation of the estate itself, and not merely of the income.

C.

ESTATES FOR LIFE.

§ 134. A limitation over of a life interest upon alienation is good; but a provision, either in a deed or will, that a life tenant shall not alienate or anticipate, — that is, a provision, not that he and his assigns shall lose the estate on alienation, but that he shall be compelled to keep it, so that neither his grantees, nor his creditors, nor any third person, can get hold of it or enjoy it, — is void. This is true whether the interest be a legal or equitable one, and whether it be in realty or personalty. *Brandon v. Robinson*, 18 Ves. 429; s. c. 1 Rose, 197. *Graves v. Dolphin*, 1 Sim.

66. *McCleary v. Ellis*, 54 Iowa, 311; 20 Am. Law Reg. N. S. 180 and note, *ul fin.* *Bridge v. Ward*, 35 Wis. 687.¹ [This is undoubtedly correct so far as legal interests are concerned. *McCleary v. Ellis* and *Bridge v. Ward* were cases of legal interests, and so were *Butterfield v. Reed*, 160 Mass. 361; *Wellington v. Janvrin*, 60 N. H. 174; *Thompson v. Murphy* (Ind.), 37 N. E. Rep. 1094; and *McCormick Harvesting Machine Co. v. Gates*, 75 Iowa, 343, where the same doctrine was laid down. And see *Re Bourke's Trusts*, 27 Ir. L. R. 573, 582, 583; *Nash v. Simpson*, 78 Me. 142, 148; *Warner v. Rice*, 66 Md. 436, 440. And this is so, even in those States where spendthrift trusts are allowed. *Hahn v. Hutchinson*, 159 Pa. 133, § 235 *g, post.* *Ehrisman v. Sener*, 162 Pa. 577. And see *Todd v. Sawyer*, 147 Mass. 570; *Maynard v. Cleaves*, 149 Mass. 307, § 240 *f, post.* The same doctrine is unquestionably true in England of equitable interests also. *Brandon v. Robinson*; *Graves v. Dolphin*; see also *Weale v. Ollive*, 32 Beav. 421; cf. *Woolley v. Preston*, 82 Ky. 415. But it cannot now be said to be universally true in the United States as to equitable interests. *Vide post.*]

§ 135. There is one case in the United States in which a legal life estate has been held inalienable. In *Christy v. Pulliam*, 17 Ill. 59, O. devised to his wife L., to hold for life, "the land that I now own and reside on, to occupy and use the said land in the same way as it would be lawful for her to do if the title were full and complete in her." He then gave part of this land, after the death of L., to certain relations, and added, "and the land not included in above bequeath I give" to L., "to dispose of at her

¹ Perhaps such a provision is good in a grant from the Crown. See *Fowler v. Fowler*, 16 Ir. Ch. 507, § 21, note, *ante*.

death to any person she may think best, to live with and take care of her." At the date of the will, as well as at the time of the testator's death, he had no land but the homestead. L. executed a deed, with covenant against incumbrances, purporting to convey to C. a portion of the land in fee (not being that part a remainder in which was given to the testator's relations). C. brought ejectment, claiming a fee, against P., a stranger, who was in possession of the land. The Court held that the power given to L. could be exercised by will only, and refused to allow the deed to be put in evidence. The jury accordingly found for the defendant. The plaintiff brought a writ of error, and the Supreme Court *in banc* held that the power could be exercised by deed, and remanded the case for a new trial. It is to be observed that the Court said that the plaintiff, having claimed a fee, could recover no less estate (pp. 62, 63). See Ill. Rev. Sts. (1845), c. 36. §§ 7, 8; Ill. Rev. Sts. (1874), c. 45, §§ 12, 13; *Ballance v. Rankin*, 12 Ill. 420; *Rawlings v. Bailey*, 15 Ill. 178.

§ 136. At the new trial the deed was admitted, and the plaintiff had a verdict. The defendant appealed. The Court *in banc*, *Pulliam v. Christy*, 19 Ill. 331, the majority of the Court having been changed, held that the power given to L. could only be executed by a writing to become operative at her death, and set aside the verdict. They say, "It clearly appearing it was the intention of the testator she should not dispose of her life estate, the deed she has made to the appellee can only take effect at her death, in which event it will operate to convey the fee, and not before."

§ 137. At the time of the execution of the deed C. had given L. a note for the price, containing a condition that

L. should devise the land to him. After the failure of C.'s suit in ejectment, L. brought ejectment against P., recovered judgment, and died, and C., to whom she had devised the land, was put in possession. The executors of L. brought suit on the note against C., and C. claimed to be allowed damages for breach of the covenant against incumbrances in his being kept out of possession till after L.'s death. The Court, *Christy v. Ogle*, 33 Ill. 295, held that the covenant against incumbrances was broken. They say, "We have decided, under the peculiar wording of that will, that she had an inalienable life estate in the premises, which did not pass by the deed"; and they held this inalienable life estate to be an incumbrance.

§ 138. This case, or rather series of cases, must be bad law. Not to speak of other difficulties with which the case bristles, there was, first, no ground for holding that the life estate was intended to be inalienable; and, secondly, a life tenant of the legal estate in land cannot be restrained from alienation. Not a shred of authority in favor of such restraint is to be found on either side of the Atlantic. [In *Emerson v. Marks*, 24 Ill. Ap. 642, an inferior court held the land devised to A. "to hold as long as she lives, without the privilege of selling it to any person" could not be taken on execution against A. The Court does not refer to *Christy v. Ogle*, but cites two cases, neither of which is in point, for in one there was a gift over on alienation, and in the other the interest was equitable. The case of *Springer v. Savage*, 143 Ill. 301, is so imperfectly reported that it is impossible to tell what is the point decided.]

§ 139. In *Marston v. Carter*, 12 N. H. 159, furniture was bequeathed to a married woman, "to be for her use

and benefit during her natural life, and after her decease to be equally divided between her children." It was held that her interest in the furniture could not be attached at law for her husband's debts. The Court say that the use bequeathed was "a personal right"; that the testator "doubtless reposed a personal confidence in those to whom he gave the use; and *those interested in the limitation over* have the right to require that the actual use should be confined to those to whom he gave it. As no security is required of a legatee for life, who is entitled to the possession, (5 N. H. Rep. 326, *Weeks v. Weeks*,) none could be required of a vendee, if the use should be transferred. It is not like a devise of real estate, where the property has a fixed location, and where waste is easily ascertained and a remedy may be had; or a bequest of personal property producing an income, which income may be transferred, or taken." That is, the Court held the nature of the property to be such that the rights of the remaindermen required that the life tenant should retain personal charge of it. The life interest of the debtor's wife was deemed inalienable for the sake of the remaindermen, and not for the sake of herself and husband. Whether creditors could reach the property by a bill in equity praying a sale and the investment of the proceeds, was a question raised by the Court, but not determined. [Cf. *Lee v. Enos*, 97 Mich. 276, § 296 *b*, *post*.]

§ 140. The recognized exception to the rule that provisions against alienating life interests are void, is in the case of a married woman. About the beginning of the eighteenth century equity established the doctrine of the separate estate of married women, by which they could have equitable interests in property apart from their husbands, and free

from their husbands' control. This doctrine has always been distinctly recognized as a violation of the rules of law, introduced for the benefit of married women.

§ 141. It was found that the doctrine gave very imperfect protection to married women, because they were still in danger of parting with their property under the influence or threats of their husbands, and Lord Thurlow, at the end of the last century, invented the clause against anticipation, which was generally adopted, and the validity of which, it was declared by Lord Eldon, in 1817, in *Jackson v. Hobhouse*, 2 Mer. 483, 488, to be too late to question. On this exception see § 269, *post*.

§ 142. It is only, however, in connection with the separate estate of a married woman that this restraint upon anticipation has been allowed in England; and the general doctrine that neither law nor equity allows any person, except a married woman, to have an inalienable life interest, has been constantly asserted. Thus, *per* Lord Cottenham, C., in the great case of *Tullett v. Armstrong*, 4 Myl. & Cr. 377, 393, 394, 405: "The power [to prohibit anticipation] could only have been founded upon the power of this court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases." "The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together." "When this Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a

wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate ; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation."

§ 143. The desire that property shall be kept in a man's family, and that his descendants shall enjoy it, while their creditors shall not, is a feeling against the manifestations of which the law has contended for centuries. This desire prompted the feudal lords to pass the statute *De Donis* in the thirteenth century ; and in recent times it has induced attempts to create inalienable life interests, generally by the transfer or devise of property to trustees in trust to apply the income for the support and maintenance of the persons intended to be benefited, without its being liable for their debts. We have now to see how far, if at all, by such or other devices, persons have succeeded in creating inalienable rights. First, the English cases will be considered, and afterwards the American. The principal English cases will be taken up chronologically.

§ 143 *a*. *Moyses v. Little*, 2 Vern. 194 (1690). A. covenanted that during his own life he would pay £15 a year to B. B. became bankrupt, and his assignee in bankruptcy brought a bill against A. "to have the benefit of this agreement." The Court said, "An assignee under a statute of bankrupt, is not entitled to have the performance of an agreement made with the bankrupt." This case has sometimes been cited as touching the matter in question. But obviously it does nothing of the sort. It decided, rightly or wrongly, that, under the bankrupt law

then existing, the bankrupt's rights in equity to enforce a contract did not pass to his assignee. If the assignment had been a voluntary one, the assignee could unquestionably have maintained his bill. In this case there was no attempt to restrain the alienation of the annuity, and in fact such attempted restraints were never heard of till near a hundred years later.

§ 144. It has sometimes been intimated that the decisions of the English Chancery invalidating trusts for support and maintenance were innovations; but in fact such trusts are themselves innovations of less than a hundred years old. In Wood's Conveyancing (1790-93) no precedents of such trusts, so common in conveyancing treatises of the present day, are to be found. See § 147, *infra*.

§ 145. *Davidson v. Foley*, 2 B. C. C. 203; 3 B. C. C. 598 (1787-1792). Lord Foley, by will made in 1777, devised land to trustees for long terms, and, on the determination of the terms, part of the land to his son Thomas for life, with remainders over, and part to his son Edward for life, with remainders over. The trustees were to hold the terms in trust to pay, apply, and dispose of so much of the rents and profits as would be sufficient as follows: first, according to their will and pleasure, and not otherwise, to allow yearly to or for the use or benefit of his two sons any sums, not exceeding in the whole in any year £6,000, until certain scheduled debts of his sons were paid, but so as his sons, or either of them, should have no estate, right, title, claim, or interest in the rents and profits during their lives and the life of the survivor [other] than the trustees should, in their absolute, free, and uncontrolled power, direction, and inclination, think proper and expedient; secondly, to pay the scheduled debts, but so as no one of his

sons' creditors, other than those whose debts were scheduled, should have a lien on or power over the lands; and, thirdly, after the death of the survivor of his sons and the payment of the debts, the terms should wait on the inheritance. The sons in Lord Foley's lifetime sold to the plaintiffs annuities payable during the lives of the sons and the survivor at the rate of seven years' purchase, and gave bonds conditioned to pay the annuities. These debts were not scheduled. Lord Foley having died, and the annuities being unpaid, the plaintiffs got judgment on their bonds, sued out *elegits*, and now brought a bill against the trustees, alleging that the scheduled debts were paid, and praying that the lands might be delivered to them as tenants by *elegit*, and the trustees enjoined from setting up the terms against any ejectment the plaintiffs might bring. The defendants demurred. Lord Thurlow said (2 B. C. C. 213): "I would not willingly break in upon any power given by a father to control the extravagance of his sons; I would rather extend those powers than control them." "The discretion of the trustees should be extended, against such plaintiffs as these, as far as possible."¹ But he thought that, on the payment of the scheduled debts, there was a resulting trust of the terms to the sons, and so he overruled the demurrer. At the hearing, it was held that the steps required by 17 Geo. III. c. 26, for the validity of a judgment on such annuity bonds, had not been complied with, and the bill was dismissed. The validity of the provision for support and maintenance did not come before the court. On the demurrer, it was held that such provision was to

¹ The preamble to 17 Geo. III. c. 26, recites that "the pernicious practice of raising money by the sale of life annuities hath of late years greatly increased."

continue in force only until the scheduled debts were paid, and, as these had been paid, the trusts of the terms had come to an end, and there were resulting trusts to the two sons who were tenants for life; and at the hearing it appeared that the plaintiffs' cause of suit failed them.

§ 146. Lord Thurlow, in his remarks at the argument on the demurrer, certainly seems to have considered such a trust valid; but it is to be observed that the testator had carefully excluded the sons from any right against the trustees, and Lord Eldon, who was in 1792 at the height of his practice at the bar, said, in *Brandon v. Robinson*, 18 Ves. 429, 434: "In the case of *Foley v. Burnell*, 1 B. C. C. 274 [another case on the same will], this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley, with the view of depriving the creditors of his sons of any resort to their property; but it was argued here, and as I thought admitted, that if the property was given to the sons it must remain subject to the incidents of property; and it could not be preserved from the creditors unless given to some one else."¹

§ 147. How unusual and surprising this provision was, is shown by the addition to Mr. Butler's note to Co. Lit. 223 *b*, which first appeared in the fourteenth edition, 1791. "In *Davidson v. Foley*, Brown's Reports in Cha. 2 vol. 203, the reader will find a curious instance of a trust under which two persons are become virtually entitled to a very considerable annuity, at the same time that the trust is so framed as to exclude their creditors from having any charge or lien upon the annuity, either at law or equity. The illusory nature of estates and trusts of this description raises a

¹ Rose, in his report of *Brandon v. Robinson*, 1 Rose, 197, 199, gives *Codrington v. Foley*, 6 Ves. 364, as the case referred to.

powerful objection to them on the ground of policy; nor are they, perhaps, quite reconcilable to some of the fundamental principles of our law. Serious consequences, it is presumed, would ensue their coming into general or even frequent use." Mr. Butler's "perhaps" carries a greater weight of disapproval than most writers' confident assertions.

§ 148. There seems to have been an idea prevalent at this time, among some of the conveyancers, that such clauses might be sustained. See 1 Hayes, Conv. (5th ed.) 506. And Sugden, in the first edition of his book on Powers, published in 1808 (when he was twenty-seven years old), said (p. 105), "By our law one man may create an inalienable personal trust in favor of another for his support and maintenance." But this statement he struck out in the second edition, published in 1815, and it is there said (pp. 109, 110), that "by our law, if an estate is given to a man, he must take it with all its incidents"; that a man may alien a life estate, "notwithstanding any declaration to the contrary in the instrument by which the estate is created"; and that "upon the first introduction of the words *by anticipation* [in a married woman's separate estate], it was, however, the general opinion of the profession that they were simply void."

§ 149. *Brandon v. Robinson*, 18 Ves. 429; 1 Rose, 197 (1811). A testator directed money to be invested in public funds in the names of trustees, and the income, as the same became payable, paid from time to time into A.'s own proper hands, on his own proper order and receipt, signed with his own proper hand, to the intent the same should not be grantable, transferable, or otherwise assignable by way of anticipation, with a gift over on A.'s death. A.

became bankrupt. Held, that his assignees were entitled to his life interest. This was followed by *Barton v. Briscoe*, Jac. 603; *Graves v. Dolphin*, 1 Sim. 66; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Jones v. Salter*, Id. 203; *Brown v. Pocock*, Id. 210; to the same effect.

§ 150. *Green v. Spicer*, Tambl. 396; s. c. 1 Russ. & M. 395 (1830). Devise to trustees on trust to apply the rents and profits to or for the board, lodging, maintenance, support, and benefit of A., at such times and in such manner as they should think proper, during his life, such application to be at the entire discretion of the trustees; and A. not to have any power to sell or mortgage, or anticipate in any way, the same rents and profits. A. took the benefit of the Insolvent Act. Held, by Sir John Leach, M. R., that A.'s assignees were entitled to the rents and profits. [See *Re Coleman*, 39 Ch. Div. 443, 452.]

§ 151. *Piercy v. Roberts*, 1 Myl. & K. 4 (1832), was the gift of an absolute interest in personalty, not of a life interest. See the case stated, § 106, *ante*.

§ 152. *Snowdon v. Dales*, 6 Sim. 524 (1834). £800 were given by deed to trustees in trust, during the life of A., or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, or at such other time or times, and in such sum or sums, portion and portions, as they should judge proper and expedient, to allow and pay the interest of the £800 into the proper hands of the said A., or otherwise, if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessities; but so that he should not have any right, title, claim, or demand in or to such interest other than the trustees should, in their absolute and uncontrolled power, discretion, and inclination, think proper

or expedient, and so as no creditor of his should or might have any lien or claim thereon in any case, or the same be in any way subject or liable to his debts, disposition, or engagements; and after his death, to his widow during her life; and after the death of A. and his widow, the £800, and all savings or accumulations of interest, if any, should be in trust for his children in equal shares, with benefit of survivorship on any of them dying under twenty-one; but if he should have no child who should attain twenty-one, then the £800 and all savings and accumulations of interest, if any, should go over. A. became bankrupt. His assignees claimed the interest of the £800 during the bankrupt's life. Mr. Bethel, for the assignees, contended "that the words 'savings and accumulations' meant such savings and accumulations as might be made after the death of A. and his widow, and until his children attained twenty-one." The Vice-Chancellor, Shadwell, seems to have adopted this view, for he held that the trustees had no power to withhold any of the income during the life of A., and consequently decreed that the assignees were entitled.

§ 153. In 1837 came *Josselyn v. Josselyn*, 9 Sim. 63, the first of the series of cases given, §§ 107–112 *a*, *ante*, in which directions to accumulate income without a gift over have been held void.

§ 154. *Rippon v. Norton*, 2 Beav. 63 (1839). Property was given by deed to trustees in trust for J. during his life, till his insolvency, and on his insolvency then to pay and apply the income, in such manner and to such persons, for the board, lodging, and subsistence of J. and his family, as the trustees should think proper, and on J.'s death over. J. took the benefit of the Insolvent Act. He had three children. His wife was dead. The children claimed three

fourths of the income, admitting that A.'s assignee in bankruptcy was entitled to the other fourth, and Lord Langdale, M. R., decreed accordingly. [This case seems to be disapproved in *Re Coleman*, 39 Ch. Div. 443, 448.]

§ 155. *Page v. Way*, 3 Beav. 20 (1840). By deed, real and personal estate were given to trustees in trust to receive the rents and profits, "and pay and apply the same, when received, unto or for the maintenance and support of" A., "his wife and children (if any); or otherwise, if they should so think proper, permit the same rents, etc. to be received by" A. for life, but without power to anticipate, and on his death over. A. became bankrupt. He had no children. Held, by Lord Langdale, M. R., that the assignees took the whole income, subject to a proper allowance for the wife, to be settled by the master.

§ 156. *Twopeny v. Peyton*, 10 Sim. 487 (1840). Property was devised to trustees in trust during the life of A. (who was then a bankrupt and insane, and known by the testator to be so), to apply the whole or such part of the interest, at such times, in such proportions, and in such manner, for the maintenance and support of A. (and for no other purpose whatever), as the trustees should in their discretion think most expedient, and subject to this trust the property was given to A.'s children. Held, by Shadwell, V. C., that A.'s assignee in bankruptcy was not entitled to any part of the income.

§ 157. *Godden v. Crouchurst*, 10 Sim. 642 (1842). Devise to trustees in trust to pay and apply the income for the maintenance and support of A. and any wife and child or children he might have, and for the education of such issue, or any of them, as the trustees should in their discretion think fit; and on the death of A. and his wife, then

over. A. was adjudged a bankrupt. Shadwell, V. C., held that the assignees in bankruptcy took nothing.

§ 158. *Lord v. Bunn*, 2 Y. & C. C. C. 98 (1843). Property was given by deed to trustees in trust to apply, lay out, and expend the income in and towards the maintenance, clothing, lodging, and support of A. and his wife and his children, or any of them, or otherwise for his, her, their, or any of their use and benefit, in such manner as the trustees should in their discretion think proper, with a gift over upon A.'s death. A. married, had several children, and took the benefit of the Insolvent Act. Knight Bruce, V. C., decreed "that the trustees have a right to apply the rents among the insolvent, his wife and children, or any of them, the insolvent, his wife and children, exclusive of any other of them," and that any right of the insolvent passed to his assignee.¹

§ 159. *Kearsley v. Woodcock*, 3 Hare, 185 (1843). Bequest to trustees in trust to pay, apply, and dispose of the income during the life of either M. or N., for and towards the support and maintenance of A., and of his wife and family, or otherwise for his or their benefit, in such manner as the trustees should think proper; and, after the death of M. and N., in trust to settle and assure, or pay and apply and dispose of the principal and income to and in trust for, or for the benefit of, A. and his family, in such manner as the trustees should, in their discretion, think proper. A. was married, had children, and was adjudged a bankrupt. M. and N. were still alive. Wigram, V. C., decreed that

¹ ["The Court here intimated a doubt whether more was meant" (in *Lord v. Bunn*) "than that whatever interest the insolvent had, if the trustees did not exercise any discretion, would go to the assignee." *Re Coleman*, 39 Ch. Div. 443, 448.]

A. was not entitled to any part of the income separately from his wife and children ; and that any interest of A. not required for the support and maintenance of his wife and children went to the assignees ; and he referred it to the master to inquire whether the income was more than sufficient for the maintenance and support of A.'s wife and children, and if so, by how much.

§ 160. *Younghusband v. Gisborne*, 1 Coll. 400 (1844). Devise to trustees in trust during the life of J. to raise £400 yearly, and to hold the same on trust for the personal support, clothing, and maintenance of J., so as not to be subject or liable to any of his creditors, or to his own control, debts, or engagements, the annuity to be paid to J. till he should attempt to charge or incumber it, or until some one should claim it, and from that time to be applied by the trustees, or some person under their direction, for or towards the personal support, clothing, and maintenance of J., and for no other purpose whatsoever. J. took the benefit of the Insolvent Act. Held, by Knight Bruce, V. C., that his assignees were entitled. He said, "I have no doubt." [See *Re Coleman*, 39 Ch. Div. 443, 452.]

§ 161. *Rochford v. Hackman*, 9 Hare, 475, 480 (1852). In this case there was a proviso for cesser (see § 80, *ante*), but Turner, V. C., said that it was settled, without any contravention, "that property cannot be given for life, any more than absolutely, without the power of alienation being incident to the gift."

§ 162. *Wallace v. Anderson*, 16 Beav. 533 (1853). Property was given by deed to trustees in trust, during the life of B., from time to time to pay and apply and dispose of the income in such manner, for the maintenance and

support, or otherwise for the benefit, of B. and his issue by his wife A., as the trustees should think proper. In 1848 the wife died. In 1850 B. became bankrupt. In 1852 his only child died without issue. No question seems to have been made but that the assignees were entitled to the whole income after the death of the child, and Sir John Romilly, M. R., decreed this to them, and also all the balance of the income accrued before the death of the child, which had not been properly applied for its maintenance, support, and benefit. The counsel for the assignees had contended that they were entitled to half of the income before the death of the child.

§ 163. *Holmes v. Penney*, 3 K. & J. 90 (1856). A life interest belonging to C. was given by him to trustees on trust during the life of C. to pay, apply, lay out, and expend the income in and towards the maintenance, clothing, lodging, and support of C., and his present or any future wife, and his children, or any of them, or otherwise for their or any of their use and benefit, in such manner as the trustees should in their uncontrolled discretion think proper. Held, by Wood, V. C., that he could not decide what proportion of the income C.'s wife and children should take, so as to leave the rest of the income to C.'s creditors. In this case, it should be noticed, C. was the settlor. See §§ 268 *a*, 268 *b*, *post*.

§ 164. *Re Sanderson's Trust*, 3 K. & J. 497 (1857). Devise on trust yearly during the life of J. S. (who was imbecile) to pay and apply the whole or any part of the rents, issues, and profits for and towards his maintenance, attendance, and comfort. J. S. afterwards died. Held, by Wood, V. C., that J. S. had had a right during his life to so much of the income as was necessary for his comfort,

and that the balance which had not been so employed went to the residuary legatees. [See *Re Neil*, 62 L. T. N. S. 649, 651; *Re Stanger*, 60 L. J. N. S. Ch. 326; s. c. 64 L. T. N. S. 693.]

§ 165. *Re Coe's Trust*, 4 K. & J. 199 (1858). Bequest to trustees on trust to make a weekly allowance to S. towards his maintenance and support, such allowance to be in the discretion of the trustees. The testator further declared, that it should be in the discretion of the trustees to advance all or any part of the principal to S., in or towards his maintenance or advancement in the world; it being his wish that S. should have the whole benefit of such moneys if he should conduct himself steadily and to the satisfaction of the trustees, and on his death, if the whole money had not been advanced, there was a gift over. S. made assignments of his interest. The trustees paid the fund into court, not suggesting that S. had conducted himself otherwise than steadily and to their satisfaction. Wood, V. C., held that there was a gift of the fund to S., of which the trustees had the discretionary power of depriving him, but that they had not exercised the power, and that therefore S.'s assignee was entitled to the fund. [See *Re Ashburnham's Trust*, 54 L. T. N. S. 84.]

§ 166. The principle upon which these cases go is very simple. Whatever rights, legal or equitable, in property a man has, those rights are alienable. Whatever a man can demand from his trustees, that his creditors can demand from him. All the cases are in accordance with this principle, except, possibly, the two decisions of Shadwell, V. C., in *Twopeny v. Peyton*, 10 Sim. 487, § 156, *ante*; and *Godden v. Crowhurst*, Id. 642, § 157, *ante*; and in the former of these the *cestui que trust* was known

by the testator to be bankrupt and insane; while in the latter the bankrupt's interest was perhaps not separable from that of his family. See § 163, *ante*, § 176 and note, *post*.

§ 167. It is true that many of these cases were difficult to decide, and the correctness of some of the decisions may be doubtful, but the difficulty and the doubt did not lie in the application of the principle that the rights of the *cestui que trust* were alienable, but in determining what his rights were. When property is held by trustees to be applied in their discretion for the support and maintenance of John Stiles, or of John Stiles and others, it is often hard to determine what the exact rights of John Stiles are (see § 176, *post*), yet this the courts cannot avoid. If the trustees refuse to supply John's needs or wishes, or do not supply them as liberally as he thinks they should, and he complains to the courts, the courts must determine whether the trustees have violated any of his rights. It is often a difficult question, but its difficulty does not excuse the courts from passing upon it. And this is the only difficulty that arises in cases of alienation by a *cestui que trust*, or of his bankruptcy. It may be hard to determine to what he is entitled, but there is no difficulty in saying, whatever it may be, it goes to his assignee. Whatever amount of the trust fund, principal or income, a *cestui que trust* is entitled to, so that he or his executors have a right to it against any others of the *cestuis que trust*, that amount is alienable by him; and any discretion which the trustee may have as against the *cestui que trust* in the manner or time of applying the fund, is at an end. Such discretion is imposed solely for the benefit of the *cestui que trust*, not at all for his assignee.

§ 167 *a*. [*Davidson v. Chalmers*, 33 Beav. 653 (1864). A testatrix directed that in case D., who was then an uncertificated bankrupt, "should at any time obtain his certificate, so as to be enabled to hold and enjoy real and personal estate for his own absolute personal use, enjoyment, and benefit," then the income of the residue of her estate should be paid by her executors to D. during his life. After the death of the testatrix, D. received his certificate, and his assignees in bankruptcy demanded that the income of the residue should be paid to them. Sir John Romilly, M. R., held that the contingent interest devised to D. passed by the assignment, and that, the contingency of receiving a certificate having now occurred, the assignees were entitled to the income. It was contended that the testatrix meant her gift to take effect when D. could hold and enjoy the property devised. The Master of the Rolls thought that this was not the true construction, and that "if it were, the answer is, that that time will never arrive, for it is not permitted by law to give property in that manner." *Re Landon's Trusts*, 40 L. J. N. S. Ch. 370 (1871). The testator directed his trustees to set apart £1,000, and either to pay it to L. or to apply it for his benefit, or to invest it and pay or apply the income for his benefit or otherwise, as they, in their uncontrolled discretion, should think fit. The trustees paid the money into court, stating that L. had been adjudicated a bankrupt, and that they were desirous of exercising the discretion given to them. On petition by L.'s assignee in bankruptcy for the payment of the sum to him, Lord Romilly, M. R., held that the trustees had not lost their discretion, and ordered the money paid out of court to them.]

§ 167 *b*. [*In re Coleman*, 39 Ch. Div. 443 (1888), a tes-

tator gave his residuary estate to trustees in trust "to apply" the income "in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient," until the youngest of the children reached twenty-one, and then to distribute the estate equally between all the children then living. There were four children, two of whom had not reached twenty-one. A., one of the two children who were of age, assigned all his interest under the will of the testator. The trustees had always applied the income in equal shares for the benefit of the four children, paying one fourth directly to each of the adults, but on receiving notice of the assignment by A., they continued to apply three fourths of the income for the benefit of the other children, and kept one fourth in hand. The assignee applied for a decision whether A. had an interest in the income which would pass by the assignment. North, J., held that the assignee could not call upon the trustees to pay him one fourth of the income. The order, as drawn up, declared that no child was entitled, before the youngest reached twenty-one, to payment of, or had a transmissible interest in, any part of the income of the residue; that the assignee had no claim, prior to that event, against the trustees for income; and that the trustees were entitled to employ the income for the benefit and maintenance of the children, including A., at their absolute discretion. The assignee appealed.]

§ 167 c. [At the hearing before the Court of Appeal, Fry, J., asked the counsel for the infant children whether they would be satisfied with these declarations: 1. That no child before the youngest reaches twenty-one is entitled to the payment of any part of the income. 2. That the trustees are entitled to apply the income for the mainte-

nance, education, or advancement of the children, including A., in their absolute discretion. 3. That the assignee is entitled to no interest in the income, except such moneys or property, if any, as may be paid, or delivered or appropriated for payment or delivery by the trustees to A. The counsel for the infant children said they would be satisfied with these declarations. The trustees then said that they wished it decided whether they could send out goods to A., who was in Australia, and they submitted that they could. The Court were of opinion that some alteration in the terms of North, J.'s order was requisite; that no child had a right to any share of the income; that, assuming that the trustees could not exclude a child, they could allot him as little as they thought desirable; that the assignment did not include every benefit which the trustees might give to A. out of the income: "If the trustees were to pay an hotel-keeper to give him a dinner, he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment;" that the declaration proposed by Fry, J., was right; and that the trustees would not be at liberty to send over money or goods to A. The Court distinguished *Green v. Spicer* and *Younghusband v. Gisborne*, §§ 150, 160, *ante*, on the ground that in those cases the income was directed to be applied solely for the benefit of the insolvent.]

§ 167 *d.* [*Re Neil*, 62 L. T. N. S. 649. A testator gave property to trustees in trust during the life of P. to pay and apply the whole or any part of the income or accumula-

tions of income for the support, maintenance, or education, or otherwise for the benefit of P., his wife and children, or any or more of them, the said A., his wife and children, in such manner in all respects as the trustees should in their uncontrolled discretion think fit, and from time to time to accumulate all the residue of the income not applied under such discretionary power, or, if no part of the income was so applied, then the whole of the income, by investing the same and the resulting income. Provided that the trustees should have power to resort to any part of the accumulations for the purpose of applying them as authorized by the discretionary trust, and, subject to such proviso, that all such accumulations should be added to the capital to be inseparably blended therewith, and, on the death of P., in trust for the benefit of third persons. P. assigned all his interest under the testator's will as security for a debt, and the trustees had notice thereof, but, notwithstanding, they continued to pay weekly sums to P. on account of his share.]

§ 167 *e.* [The assignee prayed the Court: *First*, that the trustees might be directed out of the income accrued and to accrue due to P. under the trust to pay the debt due from P. to the assignee. *Second*, that the trustees should account to the assignee for the amounts they had paid to P. after they had notice of the assignment. The Court, following *Re Coleman*, refused the first prayer, but granted the second.

§ 167 *f.* [*Re Bullock*, 60 L. J. N. S. Ch. 341; s. c. 64 L. T. N. S. 736. A testatrix directed trustees to hold a fund in trust to pay the income to A. until he should become a bankrupt or cease to be entitled to receive such income for his own benefit, and then in trust "to pay to him or apply

for his benefit, during the remainder of his life, either the whole, or so much and so much only of the said income as" the trustees or trustee "shall in their or his uncontrolled discretion think fit;" and, subject to such interest of A., to hold the fund and the investments and income, including any accumulations of income, in trust for A.'s children, and if no such children, then to third persons. After the death of the testatrix, A., in January 1889, charged his interest under the will to secure a debt due from him to L., but the trustees did not receive notice of the charge till August 1890. The income was paid to A. up to July 1890. In October 1890, A. was made a bankrupt. The trustees applied to the Court, asking whether they might apply the whole, or any and what part, of the income in providing in such manner as they might from time to time think fit for the past and future lodging, board, clothing, maintenance, and support of A., and the payment of sundry legal expenses incurred by him or on his behalf since July 1890. L. claimed the income which had accrued after the assignment to him in January 1889, but before the notice was given to the trustees in August, 1890, on the ground that the assignment was not perfect till notice was given. He made no claim to the income after August 1890. The assignee in bankruptcy made no claim.]

§ 167 *g*. [Kekewich, J., ruled against L., on the ground that the assignment to him operated from its date as a cesser of the right to receive the income. He remarked that he thought the assignee in bankruptcy was well advised not to make any claim, and that he could see no tenable argument for such a claim, and that the question was between A. and those entitled under the gift over, who contended that the language of the will only empowered

the trustees to pay the income to A. or to apply it for his benefit, and that neither of these things could be done. He held that to pay income to A. would be no discharge to the trustees, and would render them accountable to the assignee in bankruptcy. But he also thought that they might "spend the whole or any part of the income in maintenance, using that word in its general and widest sense, and I doubt whether I was right in saying in the course of the argument that they could not properly pay" A.'s "debts."]

§ 167 *h*. [It is difficult to see how in this case those interested in the gift over had any right against the trustees. These last were authorized by the will to pay the whole of the income to A., and whether this accrued to the benefit of A. or of his assignee in bankruptcy was no concern of those in remainder.]

§ 167 *i*. [A case on which reliance is placed in *Re Bullock* is *Chambers v. Smith*, 3 Ap. Cas. 795, but it does not seem to throw light on the question. It was a case from Scotland. Property had been given to trustees in trust to transfer it to A., but power was given to them, at their discretion, to hold the property in trust to pay the income to A., and the capital on his death to his issue, on such conditions and restrictions as to the trustees might seem fit. A judgment was recovered against A., and afterwards the trustees declared that they would hold the property in trust to pay the interest only to A. for his aliment. Alimentary funds, that is, spendthrift trusts, are allowed in Scotland. Paterson, *English and Scotch Law*, § 931. It was held that A.'s judgment creditor could not lay hold of the fund. Lord Hatherley, C., said (p. 806) that the law of Scotland was in "no way different from that of England with refer-

ence to the effect of an arrest of a debtor's interest in the hands of third parties. It has been long settled in England that a judgment creditor must take his debtor's interest subject to all charges and modifications to which it is subject in the debtor's own hands." Lord Hatherley does not mean that a provision for aliment is good in England, but that by the law of England, if a trustee has a right to change the trusts of a fund against a *cestui que trust*, he has the same right against the *cestui que trust's* creditor.]

§ 167 j. [The law, as at present contained in the English books, seems to be as follows :—

1. If the income of trust property is to be paid to A. during his life, a direction that it shall be paid into his own hands, or that he shall not alienate or anticipate it, or that it shall not be liable for his debts, is void. *Brandon v. Robinson*, *Barton v. Briscoe*, *Graves v. Dolphin*, *Woodmeston v. Walker*, *Jones v. Salter*, *Brown v. Pocock*.

2. If trustees are directed to apply the income of a trust fund for the support and benefit of A. at such times and manner as they may deem fit, but have no authority to apply it in any other way, his assignee can demand the income from the trustees. *Green v. Spicer*, *Snowdon v. Dales*, *Younghusband v. Gisborne*. See, however, the remarks of Kekewich, J., in *Re Bullock*, 60 L. J. Ch. N. S. 341, 343, 344. In *Twopeny v. Peyton*, Shadwell, V. C., thought that the whole income was not payable to the lunatic.

3. If trustees are directed to apply the income of a trust fund for the support or benefit of A. and other purposes, but they have no right to exclude A., then A.'s assignee can claim from the trustees the amount which A. could have claimed should be applied for his benefit. *Rippon v.*

Norton, Page v. Way, Kearsley v. Woodcock, Wallace v. Anderson. But see the remark of Fry, J., in *Re Coleman*, 39 Ch. Div. 443, 448. *Godden v. Crowhurst* is *contra*, but see the language of Knight Bruce, V. C., in *Youngehusband v. Gisborne*.

4. If trustees are directed to apply the income of a trust fund for the support or benefit of A., or for other purposes at their discretion, and they in fact apply the whole of the income for other purposes, the assignee of A. has no claim against the trustees. *Lord v. Bunn, Holmes v. Penney.* See *Twopeny v. Peyton*.

5. If trustees are directed to pay the income of a trust fund to A., or to apply it for his support or benefit, or for other purposes at their discretion, they must account to A.'s assignee for any payments made to A. after notice of the assignment. *Lord v. Bunn, Re Coleman, Re Neil.*

6. If trustees are directed to apply the income of a trust fund for the support or benefit of A., or for other purposes at their discretion, must they account to A.'s assignee for any sums not paid to him but spent for his support or benefit after notice of the assignment? There seems to be no difference in principle between this case and No. 2, *supra*. If the assignee of A. can demand from the trustees the money which they are bound to spend for the support or benefit of A., they ought to account to him for money which they have so spent. No. 2 has the authority of Sir John Leach, M. R., Vice Chancellor Shadwell, and Vice Chancellor Knight Bruce. But see *Re Bullock* and *Godden v. Crowhurst*. In *Re Coleman* there is the most authoritative utterance on the question. In the Court of Appeal, Cotton, L. J., said: "Does the assignment include every benefit which the trustees give

to J. S. Coleman out of the income? I think not. If the trustees were to pay an hotel-keeper to give him a dinner, he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment." And he distinguished *Green v. Spicer* and *Youngehusband v. Gisborne* on the ground that "in those cases the income was directed to be applied solely for the benefit of the insolvent, which made it his property." But this last distinction, as has been remarked above, seems immaterial; and as to the benefits which it is said the trustees can still give to the spendthrift or bankrupt, doubtless there are rights which do not pass to an assignee in bankruptcy. A man may be a member of a club, and as such may have a right to sit in the clubhouse, and on stated days to eat a dinner without paying for it; and this right cannot pass to an assignee: but a trust fund does not produce dinners *in specie*; it produces only money with which indeed dinners can be bought, but which also can be assigned. According to the Court of Appeal, if the trustees buy a loaf of bread or a bottle of wine and give it to their *cestui que trust* to eat or drink, they must account for its value; but if they tell him to go into a bread or wine shop and help himself, they need not account for what they pay the shopkeeper. The distinction drawn to so fine an edge does not seem sound, and it is submitted that the true rule is that the trustees must account to the assignee for all moneys that they have paid to the *cestui que trust*, or have expended for his benefit or support. See § 279, *post.*]

§ 168. The decisions of the English Chancery which

have been cited do not set forth, as has sometimes been hinted, any novel doctrines. They are simply applications of a principle older than *Taltarum's Case*. They are a part of the struggle of the law against feudalism, and against the attempt to give the enjoyment of wealth without its responsibilities. They are modern only because the special form of dishonesty, family pride, and sentimentalism at which they are aimed is modern.

“Queritur ut crescent tot magna volumina legis
In promptu causa est, crescit in orbe dolus.”

The soundness of these decisions will be further considered when the American cases have been examined. See also §§ 143, 144, *ante*.

§ 169. Before considering the American cases in which the validity of equitable life estates has been dealt with, two things must be premised with regard to the remedy of creditors. And it is the more important to do this, because, from failure to observe the nature of the remedy sought, inferences have been drawn from certain cases which they do not legitimately support.

§ 170. *First*. Wherever there is now a Bankrupt or Insolvent Act, it is safe to say that under it equitable interests of the bankrupt or insolvent debtor pass to his assignee; but where there is no such Act, or in cases where it is not called into operation, there has been some uncertainty how far a creditor can proceed against his debtor's equitable estate. Generally, in the United States, a creditor can have his debt satisfied out of his debtor's equitable interests by filing a bill in equity, or by some statutory proceeding. He is usually required to reduce his debt to judgment (see *Armstrong v. Pitts*, 13 Grat. 235,

§ 248, *post*), although in Massachusetts he can, in certain cases, under Pub. Sts. c. 151, § 2, cl. 11, maintain a bill to reach his debtor's equitable interests without first obtaining judgment. *Crompton v. Anthony*, 13 Allen, 33. But see *Carver v. Peck*, 131 Mass. 291; [*Russell v. Milton*, 133 Mass. 180; *Powers v. Raymond*, 137 Mass. 483.] Compare also *Kempton v. Hallowell*, 24 Ga. 52, 59; [*Kent v. Curtis*, 4 Mo. Ap. 121.] If at the present day in any one of the United States there is no remedy for a creditor against the equitable interests of his debtor, of course in such State equitable interests which grantors or testators have declared inalienable cannot be reached by creditors, not because they are inalienable, but because they are equitable. Had they been expressly declared to be alienable, the result would be the same. The question of the validity of the provision against alienation is never reached.

§ 171. *Second*. Equitable interests cannot be taken on execution at law against the *cestuis que trust*.¹ Therefore, a decision that property given to trustees for the support of A. cannot be taken on an execution against A., is not a

¹ By ancient usage, in New Hampshire equitable estates in land can be taken on execution. *Pritchard v. Brown*, 4 N. H. 397. *Upham v. Varney*, 15 N. H. 462. *Hutchins v. Heywood*, 50 N. H. 491. In Alabama equitable interests in personalty can be taken on execution. *Lamb v. Wragg*, 8 Port. 73. *Williams v. Jones*, 2 Ala. 314. *Carleton v. Banks*, 7 Ala. 32. *Branch Bank v. Wilkins*, Id. 589. *Cook v. Kennerly*, 12 Ala. 42. *Clarke v. Windham*, Id. 798. (But see *Spear v. Walkley*, 10 Ala. 328.) In Connecticut equitable estates in land and interests in personalty can both be taken on execution. *Davenport v. Lacon*, 17 Conn. 278. *Johnson v. Conn. Bank*, 21 Conn. 148. [But see *Tolland County Ins. Co. v. Underwood*, 50 Conn. 493, § 199 *b*, *post*. So under the California Code. *Kennedy v. Nunan*, 52 Cal. 326; *Le Roy v. Dunkerly*, 54 Cal. 452. And in Kentucky, under Gen. Sts. (1873) c. 63, art. 1, § 21, equitable interests in land can be taken on execution. *Anderson v. Briscoe*, 12 Bush, 344. For the law in Pennsylvania, see § 216 *a*, *post*.]

decision that A.'s interest is inalienable, or that it cannot be reached by bill in equity, but simply that an equitable interest cannot be taken on execution at law. *Rice v. Burnett*, Speer, Eq. 579. *Ioor v. Hodges*, Id. 593. *Roberts v. Hall*, 35 Vt. 28. *Scott v. Gibbon*, 5 Munf. 86. *Scott v. Loraine*, 6 Munf. 117. *Roanes v. Archer*, 4 Leigh, 550. *Henderson v. Hill*, 9 Lea, 25. *Gamble v. Dabney*, 20 Tex. 69. *M'Ilvaine v. Smith*, 42 Mo. 45. [*Potter v. Couch*, 141 U. S. 296, 319. *Jennings v. Coleman*, 59 Ga. 718.] In several of these cases it is suggested that there might be a remedy in equity. See *Rice v. Burnett*, *Ioor v. Hodges*, *Roberts v. Hall*, *Roanes v. Archer*, *Gamble v. Dabney*, *M'Ilvaine v. Smith*, [and *Jennings v. Coleman*. Cf. *Cruger v. Coleman*, 75 Ga. 695.]¹

§ 172. When the trustee is one of the *cestuis que trust*, the authorities differ on the question whether he has any interest which can be taken on execution. In New Jersey, in *Bolles v. State Trust Co.*, 12 C. E. Green, 308, there was a devise to A. and his wife of the use and full enjoyment of real and personal estate during their joint lives, for their support, and the support, maintenance, and education of their children, with remainder to the children. The interest of A. in the estate was seized on execution against him. It was held that the sale would not be enjoined, for that A. took a beneficial interest, and so far as he had such interest it united with his legal estate, and gave him an interest which could be taken on execution. And see *Hobbs v. Smith*, 15 Ohio St. 419, where there was a devise to A.

¹ In *Lindsay v. Harrison*, 8 Ark. 302, a slave given to trustees in trust for a woman absolutely, and by them delivered to her, was held subject to execution for her husband's debts. But this was because the Court held the legal title to have passed to her.

for ninety-nine years, remainder to his children should he have any, A. to support himself and his family, if he ever had one, from the land, and the land not to be taken on execution for A.'s debts. A. never had any family, and the land was sold on execution against him. It was held that the term for ninety-nine years passed to the purchaser at the sheriff's sale, subject, at the most, to an equitable claim by some of A.'s family to support, and that it would be time enough to decide such a claim when it was presented. In South Carolina, on the other hand, *Jones v. Fort*, 1 Rich. Eq. 50, slaves were conveyed to A. in trust for the use of A. and his wife during his wife's life, and on her death over, and it was held that A. had no interest which could be taken on execution. And the same ruling was made in *Wylie v. White*, 10 Rich. Eq. 294, where there was a bequest to A. for life of the use and benefit of slaves, the slaves not to be disposed of by him or any other person whatsoever, but to remain exclusively for the annual support of A. and his family; the Court adding, that whatever remedy A.'s creditors had against his interest in the slaves was in equity.¹ So in Alabama, *Fellows v. Tamm*, 9 Ala. 999. A slave girl was conveyed by deed to J., "and the heirs of her body, . . . on the following terms, that is to say: I leave the said girl to J. during her, the said J.'s, natural life, forever, and the heirs of her body, with this condition, that the said girl shall be under the entire control and management of J. in the most profitable and useful way, for the use and support of J. and her heirs, during their natural life. After the death of the said J. the said negro girl shall be equally divided among the heirs

¹ A remedy was given in equity in a like case, *Creighton v. Clifford*, 6 S. Car. 188.

of the said J." J. afterwards married. Held that the slave could not be taken on execution against J.'s husband. Whether the wife's interest could be reached by the husband's creditors on a bill in equity was a matter on which the Court declined to express an opinion. See *M'Laurine v. Monroe*, 30 Mo. 462; *White v. White*, 30 Vt. 338; [*Tolland County Ins. Co. v. Underwood*, 50 Conn. 493, § 199 *b*, *post*; *Cummings v. Corey*, 58 Mich. 494; *Chase v. Currier*, 63 N. H. 90; *Durant v. Mass. Hospital Life Ins. Co.*, 2 Lowell, 575, § 266, *post*.]

§ 173. As an equitable interest cannot be taken on execution, so it is not the subject of garnishment on foreign attachment, or, as it is generally called in New England, trustee process. [*White v. Jenkins*, 16 Mass. 62. *Brigden v. Gill*, Id. 522. *Hinckley v. Williams*, 1 Cush. 490.] *Weller v. Weller*, 18 Vt. 55. *White v. White*, 30 Vt. 338. [*Steib v. Whitehead*, 111 Ill. 247. *Banfield v. Wiggins*, 58 N. H. 155. *Chase v. Currier*, 63 N. H. 90. *Drake*, *Attachm.* (7th ed.) § 454 *b*. See § 114 *a*, *ante*, *sub fin.*] In Pennsylvania, however, property was given in trust to pay the income to A. for his life, for his own use and benefit, or to such person as he might authorize, and the trustee was summoned as garnishee of A. The Court held that the trust fund was liable to A.'s creditors. *Girard Ins. Co. v. Chambers*, 46 Pa. St. 485. See § 227, *post*.

§ 174. The Statute of Frauds (29 Car. II. c. 3), § 10, enacted that execution might be had of all "such lands, tenements, rectories, tithes, rents, and hereditaments as any other person or persons be in any manner or wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued." This section of the statute has been re-enacted in several

of the United States, but it has everywhere been held to apply only when the *cestui que trust* has the entire equitable interest. *Doe d. Hull v. Greenhill*, 4 B. & Ald. 684. *Harris v. Booker*, 4 Bing. 96. *Harris v. Pugh*, Id. 335. *Lynch v. Utica Ins. Co.*, 18 Wend. 236. *Ontario Bank v. Root*, 3 Paige, 478. *Brown v. Graves*, 4 Hawks, 342. *Battle v. Petway*, 5 Ired. 576. *Thompson v. Ford*, 7 Ired. 418. And see *Presley v. Rodgers*, 24 Miss. 520. [Among other cases holding the same doctrine are *Forth v. Norfolk*, 4 Mad. 503; *Modisett v. Johnson*, 2 Blackf. 431; *Bogart v. Payne*, 1 Johns. Ch. 52; s. c. 17 Johns. 351; *Jackson v. Bateman*, 2 Wend. 570; *Bristow v. McCall*, 16 S. Car. 545; *Shute v. Harden*, 1 Yerg. 1. See *White v. Kavanagh*, 8 Rich. 377; *McIlvaine v. Smith*, 42 Mo. 45.] And therefore an equitable life estate cannot be taken on execution under this statute.¹

§ 175. Having eliminated these cases, we have now to take up the American authorities bearing on the question how far equitable rights, declared or intended to be inalienable, can be assigned by a *cestui que trust*, or made available for his creditors by proper proceedings in equity. Decisions or *dicta* upon this question are to be found in [twenty-four] of the United States, — Alabama, Arkansas, Connecticut, [Delaware,] Georgia, [Illinois, Indiana,] Kentucky, [Maine, Maryland,] Massachusetts, [Mississippi,] Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin.

¹ This provision of the Statute of Frauds, it should also be observed, applies only to realty; it does not affect chattels real. *Scott v. Scholey*, 8 East, 467. *Metcalf v. Scholey*, 2 B. & P. N. R. 461. Or chattels personal. *Caillaud v. Estwick*, 2 Anst. 381. *Hendrick v. Robinson*, 2 Johns. Ch. 263, 312.

§ 176. In some cases the trusts which have come up for decision have been for the benefit of more than one *cestui que trust*; — e. g., husband and wife, or mother and children. The cases, English and American, in which the question of separable interests has been considered are *Rippon v. Norton*, 2 Beav. 63, § 154, *ante*; *Page v. Way*, 3 Beav. 20, § 155, *ante*; *Godden v. Crouchurst*, 10 Sim. 642, § 157, *ante*; *Lord v. Bunn*, 2 Y. & C. C. C. 98, § 158, *ante*; *Kearsley v. Woodcock*, 3 Hare, 185, § 159, *ante*; *Wallace v. Anderson*, 16 Beav. 533, § 162, *ante*; *Holmes v. Penney*, 3 K. & J. 90, § 163, *ante*; [*Re Landon's Trusts*, 40 L. J. N. S. Ch. 370, § 167 *a*, *ante*; *Re Ashburnham's Trust*, 54 L. T. N. S. 84; *Re Coleman*, 39 Ch. Div. 443, § 167 *b*, *ante*; *Re Neil*, 62 L. T. N. S. 649, § 167 *d*, *ante*; *Re Bullock*, 60 L. J. N. S. Ch. 341, § 167 *f*, *ante*;] *Kemp-ton v. Hallowell*, 24 Ga. 52, 58, § 184, *post*; *Rugely v. Robinson*, 10 Ala. 702, § 185, *post*; *Hill v. McRae*, 27 Ala. 175, § 186, *post*; *Robertson v. Johnston*, 36 Ala. 197, § 187, *post*; *Jones v. Reese*, 65 Ala. 134, § 188, *post*; [*Bell v. Watkins*, 82 Ala. 512, § 188 *a*, *post*; *Tolland County Ins. Co. v. Underwood*, 50 Conn. 493, § 199 *b*, *post*;] *Cosby v. Ferguson*, 3 J. J. Marsh. 264, § 203, *post*; *Flournoy v. Johnson*, 7 B. Monr. 693, 696, § 118, *ante*, § 204, *post*; [*Cromie v. Ball*, 81 Ky. 646; *Warner v. Rice*, 66 Md. 436, § 240 *k*, *post*;] *Foster v. Foster*, 133 Mass. 179, § 240 *c*, *post*; [*Slattery v. Wason*, 151 Mass. 266, § 240 *f*, *post*;] *Nichols v. Eaton*, 91 U. S. 716, §§ 251 *et seqq.*, *post*;] *Durant v. Mass. Hosp. Life Ins. Co.*, 2 Lowell, 575, § 266, *post*; [*Raynolds v. Hanna*, 55 Fed. Rep. 783; s. c. *sub nom. Brooks v. Raynolds*, 59 Fed. Rep. 923, §§ 267 *d*–267 *f*, *post*;] also a series of cases in Virginia, see §§ 241–249, *post*; and the cases cited in § 172, *ante*.

§ 177. [In the former edition, after it had been said that decisions or *dicta* on the question of the possibility of restraining the alienation of equitable life estates were to be found in eighteen States, and that in Virginia no case of a separable interest had occurred, the following statement was made.] In eleven of the other seventeen States, the question has been decided ; in six there are only *dicta*. Of the eleven States in which decisions have been made, the courts of eight have held all restraints against alienation on equitable life interests invalid. In one State the decisions are conflicting, the latest being in accord with the doctrine generally held. In only two States are such restraints held legal. Such restraints have been adjudged bad in Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Tennessee, and Ohio ; in Kentucky the decisions conflict ;¹ and in Pennsylvania and Massachusetts “spendthrift trusts,” so called, are allowed. Of the six States in which *dicta* only are to be found, in New Jersey, Missouri, Arkansas, and Wisconsin, they accord with the weight of authority ; in Vermont a *dictum* has been supposed, probably incorrectly, to be to the contrary ;² and in Connecticut they conflict,³ — that is, the decisions and *dicta* in twelve States are against the validity of such restrictions ; in two, or at the most three States, they favor them ; and in two they conflict ; the later de-

¹ The one case in favor of the validity, *White v. Thomas*, 8 Bush, 661, is opposed to several cases, both earlier and later.

² This single *dictum* in *White v. White*, 30 Vt. 338, sometimes cited as favoring the validity of such restrictions, will be shown to have no such meaning.

³ But the earlier *dicta* in *Leavitt v. Beirne*, 21 Conn. 1, in favor of the validity, are overruled by later *dicta* to the contrary. *Easterly v. Kenney*, 36 Conn. 18, 19, 22.

cisions and *dicta* in these last two States being against the validity.

§ 177 *a*. [But this statement would be far from giving correctly the state of the law at the present day. Of the twenty-four States in which the question has now been discussed, it has been decided in sixteen ; in eight there are only *dicta*. Of the sixteen States in which decisions have been had, the courts of eight have held restraints against alienation on equitable life estates bad, and in eight States they have been held good. Such restraints have been adjudged bad in Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Ohio, and Kentucky ; while in Pennsylvania, Massachusetts, Illinois, Maine, Maryland, Mississippi, Vermont, and Missouri “spendthrift trusts,” so called, are allowed. Of the eight States in which *dicta* only are to be found, in New Jersey and Arkansas the *dicta* are against the validity of such restraints ; in Tennessee, Delaware, Indiana, and Virginia they are in favor of them ; in Wisconsin and Connecticut the language of the cases is conflicting ; that is, the decisions and *dicta* in ten States are against the validity, and in twelve States are for it ; while in two States they are conflicting.]

§ 178. The most convenient mode of considering the cases will be to take them by States. I. Restrictions on alienation invalid. (A.) *Decisions* : Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Ohio, Kentucky. (B.) *Dicta* : New Jersey, Arkansas. — II. Conflicting. *Dicta* : Wisconsin, Connecticut. — III. Restrictions on alienation valid. (A.) *Decisions* : Pennsylvania, Massachusetts, Illinois, Maine, Maryland, Mississippi, Vermont, and Missouri. (B.) *Dicta* : Tennessee,

Delaware, Indiana, and Virginia. After the States will be considered the decisions and *dicta* in the Federal courts.

§ 179. *Rhode Island*. — *Tillinghast v. Bradford*, 5 R. I. 205. Devise to T. in trust to pay the income to H. for life, the payments to be made from time to time, not in the way of anticipation, nor to his assigns, and to be for his sole and separate use. H. assigned all his estate for the benefit of his creditors. It was held, after very full argument, that the assignee was entitled to have the income paid over to him during H.'s life. The Court say: "This has been the settled doctrine of a court of chancery, at least since *Brandon v. Robinson*, 18 Ves. 429, and, in application to such a case as this, is so honest and just that we would not change it if we could. Certainly no man *should* have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should be also amenable to the demands of justice." [See *Ryder v. Sisson*, 7 R. I. 341.]

§ 179 a. [*Stone v. Westcott*, 29 Atl. R. 838. A testatrix empowered her executors in their discretion to sell or mortgage any of her real estate, and apply from the proceeds, for the benefit of her husband, such sums and in such manner as they might deem best. The Supreme Court of Rhode Island held that the power in the executors was purely discretionary, and that they could not be compelled to exercise it at the suit of the husband's creditors.]

§ 180. *New York*. — The rules of law and equity with regard to trusts were wholly abrogated in New York by the Revised Statutes of 1828, which now govern the entire subject; and therefore the decisions of the courts would throw no light on the question we are now con-

sidering, were there not fortunately a case which fell outside the Revised Statutes, and which shows that the doctrines of equity were fully accepted in that State.¹ In *Bryan v. Knickerbocker*, 1 Barb. Ch. 409, by deed executed before the Revised Statutes, and to which therefore they did not apply, real and personal property were given to trustees in trust, to apply, from time to time, so much of the rents and income to the use and support of the grantor, and of his family, if he should marry and have a family, during his life, as the trustees should deem discreet and reasonable, and to accumulate the residue of the rents and income for the benefit of the grantor's heirs. The grantor never married, and the trustees allowed him \$900 a year, and accumulated the residue. It was held by Ruggles, V. C., and on appeal by Walworth, C., that this allowance was liable for the grantor's debts. The case was not rested, as in truth it might well have been, on the ground that the trust, being created by the grantor, was wholly void as to him, but was treated as if the trust had been created by a stranger, and the decision was supported by *Green v. Spicer*, 1 Russ. & Myl. 395, and *Piercy v. Roberts*, 1 Myl. & K. 4.

§ 181. Besides this decision the *dicta* in New York are to the same effect. In *Havens v. Healy*, 15 Barb. 296, property was given to H. in trust "for the benefit of my son J., and to be paid to him in small sums, for the support of himself and family, or otherwise as said H. shall decide, or for a home to be kept in trust for said J." It was held that the property could be reached by judgment

¹ The decisions under the New York Statutes, which are sometimes wrongly referred to, as if they bore on the general question, are collected in Appendix I.

creditors, the provisions of the statutes with regard to inalienability of trust estates applying only to life interests. The Court said: "The cases of *Green v. Spicer*, *Piercy v. Roberts*, and *Snowdon v. Dales* have been repeatedly sanctioned by our courts as containing the true rule, and are decisive of this case." In *Bramhall v. Ferris*, 14 N. Y. 41, 44, Comstock, J., said that, if a bequest had been given "absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law. *The Blackstone Bank v. Davis*, 21 Pick. 42. *Hallett v. Thompson*, 5 Paige, 583. *Graves v. Dolphin*, 1 Sim. 66. *Brandon v. Robinson*, 18 Ves. 429." And in *Rome Exchange Bank v. Eames*, 4 Abb. Ct. App. 83, 99, Denio, C. J., said: "It is against general principles that one should hold property, or a beneficial interest in property, by such a title that creditors cannot touch it. But our statute expressly permits such arrangements." See too *Hallett v. Thompson*, 5 Paige, 583, citing with approval *Graves v. Dolphin*, *Brandon v. Robinson*, *Green v. Spicer*, and *Piercy v. Roberts*; and compare *Degraw v. Clason*, 11 Paige, 136; *Graff v. Bonnett*, 31 N. Y. 9, 25, *per* Denio, C. J.; *Brown v. Harris*, 25 Barb. 134; *Ireland v. Ireland*, 18 Hun, 362.

§ 182. *North Carolina*. — Property was devised to T. in trust to apply annually the rents and profits to the use and benefit of C. during C.'s life, "so that they be not sub-

ject to be sold or disposed of by" C., or "anticipated by him, or be in any manner subject to his debts or contracts." Held, that C.'s interest was assignable. *Dick v. Pitchford*, 1 Dev. & Bat. Eq. 480. Bequest to trustees in trust for the use and support of W. and S. for their lives, to be applied to their support, and not to be subject to their disposal or debts. W. died. Held that S.'s interest was assignable. *Pace v. Pace*, 73 N. C. 119. See *dicta* accordingly in *Bank of the State v. Forney*, 2 Ired. Eq. 181, 184, and especially in *Mebane v. Mebane*, 4 Ired. Eq. 131, where the interest was absolute, and not for life. [But see *Monroe v. Trenholm*, 112 N. C. 684; 114 N. C. 590, §§ 124 s - 124 n, *ante*.]

§ 183. *South Carolina*. — *Heath v. Bishop*, 4 Rich. Eq. 46. Property was conveyed to T. in trust to pay to C. the net income "for the better support and maintenance of the said C.," and on C.'s death over. The Court held that C.'s interest was liable in equity for his debts, citing the cases in the English Chancery, and laying down the doctrines of equity with clearness and precision. [See *Wylie v. White*, 10 Rich. Eq. 294.]

§ 184. *Georgia*. — *Kempton v. Hallowell*, 24 Ga. 52. Property of a woman was at her marriage settled on trustees in trust to and for the joint use and benefit of husband and wife, during their joint lives, but not to be subject in any way or manner to the debts, contracts, or engagements of the husband. It was held that the husband's interest in the income could be reached in equity by his creditors. In *Bailie v. McWhorter*, 56 Ga. 183, property was devised to trustees in trust for the sole use and benefit of A. during his life, permitting him, in the discretion of the trustees, to have such control over the property, and such only, as

might be compatible with preserving it unimpaired for his maintenance, free from all liability for any of his debts or contracts, and on his death over. Held that the income of the trust fund was liable for the debts of the *cestui que trust*, and that a receiver should be appointed. [See *Mathews v. Paradise*, 74 Ga. 523.]

§ 185. *Alabama*. — *Rugely v. Robinson*, 10 Ala. 702. Devise to A. and his heirs, in trust for the benefit of E., “but the same shall not be subject to the payment of any debt that he may owe, but the same shall be held for the use and benefit of E. and his family,” during E.’s life, and on his death over. Held, that so far as the gift included property which was intended to be used jointly by E. and his family, *in specie*, as a house, furniture, etc., it was incapable of severance, and could not be reached by E.’s creditors; that so far as it consisted of other property E. and his family took equal shares; and that E.’s share was subject in equity to the payment of his debts. Collier, C. J., dissented, on the ground that the interest of E. was not separable from that of his family; but all the judges fully recognized the soundness of *Brandon v. Robinson*. See s. c. 19 Ala. 404.

§ 186. *Hill v. McRae*, 27 Ala. 175. Devise to L. in trust for the use and benefit of T., the same to be held, used, and managed by L., L. from time to time to pay over to T. such part of the income (or the whole thereof if required) as might be “necessary for the comfortable and reasonable support of the said T., and of his wife and children, should he have any, the same to be used by the said T.,” and L. was “expressly forbidden to pay any of the debts of the said T.,” and on T.’s death over. T. afterwards married. Held that T.’s interest could not be

reached by a judgment creditor, on the ground that it was not separable from his wife's.

§ 187. *Robertson v. Johnston*, 36 Ala. 197. Property was held in trust for the use and behoof of Delilah Johnston, and the heirs of her body begotten or to be begotten, free from her husband's control and debts, and upon further trust that the trustee should and would permit all or such portion of said property to be under the control of said Delilah as "may be necessary for the comfort and welfare of her and her children," but the trustee to have the right to take possession of the property should he deem it necessary or proper, and so to employ and manage the same as should be to the true interest and benefit of the said Delilah and her children, with a gift over at her death to her husband, if she died before him without issue. The husband died. Held that Delilah's share of the income was liable to her debts.

§ 188. *Jones v. Reese*, 65 Ala. 134. Devise to D. in trust "for the use, benefit, and behoof" of the testator's son L. for life, "the rents and profits thereof to be discreetly used for the genteel and comfortable support and maintenance of my said son, also for any family he may hereafter have; and whenever there shall accrue any surplus of rents and profits, not needed for the purposes above set forth, then the said trustee shall invest the same judiciously, with the same uses, trusts, and limitations here made. It is distinctly my will that in no event shall the *corpus* of the property bequeathed and devised unto my said son, or any investment of property made as above directed by the said trustee, ever be liable for the debts and contracts by him, my said son, nor shall the rents and profits be liable, only on contracts for necessities"; and

on L.'s death over. Held that a mortgage by L. and his wife on their interest in the property, although not for necessities, was valid, and that their interest was separable from that of their children. *Hill v. McRae*, 27 Ala. 175, was distinguished on the ground that the interest of the debtor was in that case not separable from the interest of others. The same decision has been made in the case of absolute interests. *Smith v. Moore*, 37 Ala. 327. *Taylor v. Harwell*, 65 Ala. 1. See §§ 115, 117, *ante*.

§ 188 *a*. [*Bell v. Watkins*, 82 Ala. 512. Deed by which land valued at \$2,400 was conveyed to T. in trust that he should hold the land for the use of J., his wife and children, during the life of J. and his wife, and permit J. to use, occupy, and cultivate the land for the use and benefit of his wife and children, for their support and the education of the children. On a bill by a judgment creditor of J.'s wife to subject her interest in the land to the satisfaction of the judgment, it was held that she had no separable interest in the land which could be so taken.¹]

§ 190. *Ohio*. — *Wallace v. Smith*, 2 Handy, 79. Devise to A. and his heirs in trust for the benefit of S., the income to be paid only on the order or receipt of S., and no part or amount of the income to become due or payable to S. until he should make personal application or draw an order therefor. The trust to cease on S.'s death, and the property to go over. It was held that S.'s life interest was subject in equity to his debts. In *Hobbs v. Smith*, 15 Ohio St. 419, a provision that a term should

¹ These decisions in Alabama as to the severableness of the interests of *cestuis que trust* when there are more than one of them, should be compared with the other decisions on the same point cited in § 176, *ante*.

not be held liable to the debts of the lessee was held void. See § 278, *post*.¹ [In *Stanley v. Thornton*, 7 Ohio C. C. 455, a testator directed that a trustee should have the interest of the residue for the use and benefit of E. for her education and support during her life. It was held that E.'s interest could be reached by a creditor.]

§ 190 *a*. *Kentucky*. — There have been several cases in Kentucky. The main current of authority is entirely coincident with the English law ; but there is one case not to be reconciled with it, which will be mentioned in its order.

§ 190 *b*. *Eastland v. Jordan*, 3 Bibb, 186. A. conveyed a slave to J. in trust that the proceeds of his hire should be applied to the maintenance of C. during his life. Ky. St. Dec. 19, 1796, § 13, provides that “estates of every kind, holden or possessed in trust, shall be subject to like debts and charges of the persons to whose use or for whose benefit they were or shall be respectively holden or possessed, as they would have been subject to if those persons had owned the like interest in the things holden or possessed as they own or shall own in the uses or trusts thereof.” The effect of this statute was to make estates which before were liable for debts in equity only now liable at law. It was held that the slave could be taken on execution against C. for at least C.'s life.

§ 190 *c*. *Jones v. Langhorne*, 3 Bibb, 453. It was here decided that slaves held in trust could, under the statute cited above, be taken for the debts of the *cestui que trust*.

¹ In *Wallace v. McMicken*, 2 Disney, 564, there was a devise of an annuity to A. in trust for the use and benefit of his wife and family during his life, and not to be subject to A.'s debts. It was held that “family” did not include A. himself.

The terms of the trust are not stated. So *Anderson v. Briscoe*, 12 Bush, 344. See *Blanchard v. Taylor*, 7 B. Monr. 645.

§ 190 *d.* *Cosby v. Ferguson*, 3 J. J. Marsh. 264. A. conveyed property to trustees in trust, "for the benefit of himself and family, the interest to be appropriated to the maintenance and use of his family and himself during their lives." It was held that the deed could not be set aside as fraudulent; but that A.'s interest could be reached under Ky. St. Dec. 17, 1821, § 6, which provides that a judgment creditor, after execution returned unsatisfied, may reach by bill in equity "any choses in action belonging to the debtor, and also any equitable or legal interest in any estate, real, personal, or mixed, which the debtor may be entitled to." The court say: "His maintenance (if this be the only interest) must require an annual, or perhaps daily, appropriation by the trustee of a portion of the trust fund. To that extent, certainly," A. "has an interest in the trust property, and his creditors are in equity entitled to it."

§ 190 *e.* *Flournoy v. Johnson*, 7 B. Monr. 693. A. devised property to B. for the "special use and benefit of C. and his family, if he should have one." It does not appear whether the interest was for life or absolute. It was held that C.'s interest could be reached by his creditors on bill in equity.

§ 190 *f.* *Pope v. Elliott*, 8 B. Monr. 56. Executors were directed to dispose of the testator's estate "as follows: . . . for the support of my son R. twenty-five dollars per month." It was held (p. 62) that this interest of R. could not be reached by a creditor on bill in equity against R., because the creditor had not recovered judg-

ment and taken out execution as required by Ky. St. Dec. 17, 1821, § 6, cited in § 190 *d*, *ante*. It is important to notice this case, because it is often referred to (e. g. in *Nichols v. Eaton*, 91 U. S. 716, 728, 729) as deciding that a fund for the support of a person is not liable for his debts, whereas what it decided was that under the Kentucky statute (which accords in this point with the general doctrines of equity, see § 170, *ante*) a creditor could not maintain a bill in equity to reach an equitable interest of his debtor without obtaining a judgment. It is true that the *dicta* of the judge go beyond this, but those *dicta* are inconsistent both with the earlier and later decisions in Kentucky.

§ 190 *g*. *Samuel v. Salter*, 3 Met. 259. Devise to A. in trust out of the income to furnish to B., from time to time, as he might need the same, such sums as might be sufficient for his reasonable and comfortable support during his life; any surplus of income, after furnishing such maintenance, to be divided among B.'s children; B. to have no power to charge the maintenance, and support bequeathed him with his debts, or to lay the fund under any liability; in furnishing the maintenance, the trustee not to be restricted or limited to the income. A creditor of B.'s obtained judgment, issued an execution which was returned unsatisfied, and then brought a proceeding under the Civil Code of Practice, § 474 (which was a substantial re-enactment of Ky. St. Dec. 17, 1821, § 6). Held, that B.'s interest was subject to be applied in payment of the judgment. This case must be taken as overruling any *dicta* to the contrary in *Pope v. Elliott*, § 190 *f*, *ante*.

§ 190 *h*. *Rowan v. Rowan*, 2 Duv. 412. Here was a devise to trustees in trust for A. for life, remainder to his

children, with permission to the trustees to sell a part of the principal to pay A.'s debts. It was held that it was discretionary in the trustees to sell the property for A.'s debts or not; that is, it was in their discretion whether to give the property to A.'s creditors or to the remaindermen; and that the court could not compel them to exercise their power for the benefit of the creditors.

§ 190 *i.* *White v. Thomas*, 8 Bush, 661. A testator, having by will devised his farm to A., made a codicil by which he directed his executor to give and allow Mrs. Ann White, "during her life, the use, benefit, and enjoyment of the dwelling in which I now reside, together with twenty and three fourths acres of land. . . . I also direct that my executor shall give and allow to Mrs. Ann White, during her life, the possession and use of all my household and kitchen furniture. It is my intention, and I so direct, that Mrs. Ann White shall enjoy the above described property for her own separate use, and it shall not be subject to alienation or sale, either by her or for her debts; and any attempt to do so, either by herself or any creditor or creditors of hers, shall immediately terminate her right to use and enjoy said property; and my executor shall take possession of the same, and hold and dispose of it as directed in my foregoing will. But in the event that Mrs. White is deprived of the use of said property, as is provided above, it is my will, and I direct that my executor shall pay over to her, for her use, from month to month, during her life, a sum equal to the reasonable rent of said dwelling-house and twenty and three fourths acres of land. My executor shall not anticipate said monthly payments, but shall make them from month to month for the maintenance of Mrs. Ann White during her life, and

for no other purpose." A suit in equity was brought by creditors of Mrs. White to reach her interest. The Court held that the institution of the suit did not terminate Mrs. White's first interest under the will, and that the provision allowing Mrs. White to use and occupy the property gave her no interest, equitable or legal, which could be reached by creditors. See § 190 *l*, *post*.

§ 190 *j*. *Knefler v. Shreve*, 78 Ky. 297. A testator gave his estate to his children, and directed that half of each child's share should be conveyed to a trustee, "to be held for the use and benefit of each child" during its life, and then over, without any power in the child "to incur said estate or anticipate the rents thereof," the trustee to pay the rent to the child in person quarterly; and the testator declared that he put "these restrictions" on the half-share, not because he distrusted his children's capacity, but because such half would "give them a comfortable living in the event they should be unfortunate in business, or otherwise," and because he wished "to shield and protect them against casualties and accidents as far as possible." On a child's death, its share was given over. A son transferred all his interest in the half held in trust to an assignee for the benefit of his creditors. Held that the assignment was valid. [And see *Woolley v. Preston*, 82 Ky. 415; *Parsons v. Spencer*, 83 Ky. 305. Cf. also *Bland v. Bland*, 90 Ky. 400, § 82 *a*, *ante*; *Bull v. Kentucky Bank*, 90 Ky. 452.]

§ 190 *k*. *Davidson v. Kemper*, 79 Ky. 5. Devise to trustees for the equal use and benefit of the testator's wife and children, the trustees to pay to each of the children, or for their use and benefit, "a sum or sums suitable and proper for the support of each, not exceeding" its share of

the income. A creditor of a child sought to reach his interest in this property. The Court held that it was "left discretionary with the trustee as to whether the *cestui que trust* should have the use or benefit of any of the property held in trust"; that "it was not intended to give him any enforceable claim against the" trustees; that the trustees had "a naked permission to use not exceeding the income of a certain part of the estate for the support and maintenance" of the child; and that there is "no duty on their part to him which is enforceable at law or in equity; and consequently there are no rights to which creditors can be substituted" (pp. 11, 12). It may be doubtful how far the Court were right in holding that the trust was not enforceable by the beneficiary, but, having reached this result, they were clearly correct in holding that it could not be reached by creditors.¹

§ 190 *l*. The decision in *White v. Thomas*, § 190 *i*, *ante*, was a departure from the received doctrine of the invalidity of restraints against alienation, and is all the more remarkable because Mrs. White would appear to have taken a legal estate in the land. No decision like it was at that time to be found in any of the State courts, except in Pennsylvania; and in Kentucky itself its authority is outweighed by *Eastland v. Jordan*, *Cosby v. Ferguson*, *Flournoy v. Johnson*, *Samuel v. Salter*, *Knefler v. Shreve*, [*Woolley v. Preston*, and *Parsons v. Spencer*,] §§ 190 *b*, 190 *d*, 190 *e*, 190 *g*, 190 *j*; [and therefore it is submitted that Kentucky is to be reckoned

¹ See *Campbell v. Brannin*, 8 B. Monr. 478; *Samuel v. Ellis*, 12 B. Monr. 479, § 116, *ante*; *Luxon v. Wilgus*, 7 Bush, 205; *Best v. Conn*, 10 Bush, 36.

among those States that hold to the old law. See note to Barbour & Carroll's Ky. Sts. (1894), § 2355.]

§ 191. We now come to the States where there is no decision directly involving the invalidity of legal restraints on the alienation of equitable life estates, but where the courts have declared that such restraints are invalid. — *New Jersey*. In this State the matter is regulated by legislation. A statute, copied from the New York Revised Statutes (see § 281, *post*), provides that a judgment creditor may file a bill in equity to have the judgment satisfied out of any property held in trust for the defendant, "except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." N. J. Sts. (Rev. of 1877), p. 120, § 88. This has been construed to mean that, when a trust has been created by, or a fund held in trust has proceeded from, some person other than the *cestui que trust*, a judgment creditor of the latter cannot reach it. *Johnson v. Woodruff*, 4 Hals. Ch. 120, 729. *Frazier v. Barnum*, 4 C. E. Green, 316. *Force v. Brown*, 32 N. J. Eq. 118. *Hardenburgh v. Blair*, 30 N. J. Eq. 645, reversing s. c. *Id.* 42. [*Lippincott v. Evens*, 35 N. J. Eq. 553. This has nothing to do with clauses restraining alienation, for the statute applies to all trusts and funds not proceeding from the *cestui que trust*, whether they are provided with such clauses or not.]

§ 192. The general principle, then, apart from statute, would not have come up for discussion in this State, except that in *Hardenburgh v. Blair*, 39 N. J. Eq. 42, the Chancellor thought that the statute did not apply, and therefore had to consider the general rule of equity. Property was there given by will to executors in trust to

pay to A. the income during his life "in such manner and in such amounts as the executors should deem most prudent." The Chancellor, after discussing the authorities, held that A.'s interest could be reached by his judgment creditors. The Court of Appeal held that the statute did apply, and therefore had no occasion to pass upon the general question; but the opinion of the Chancellor shows that, apart from statute, the law in New Jersey is the same as in England.¹ See *Wells v. Ely*, 3 Stockt. 172; and compare *Bolles v. State Trust Co.*, 12 C. E. Green, 308, stated § 172, *ante*.

§ 192 *a*. [A New Jersey statute (Pub. L. 1880, p. 274, Suppl. to Rev. Sts. p. 292) now directs that the provisions of the St. of 1850 (Rev. Sts. p. 393, § 23) on discovery in aid of execution "shall apply to the income of all property or money or things in action held in trust for the debtor, where the trust has been created by, or the fund held in trust has proceeded from, some other person than the debtor himself; *provided*, the income of such trust property shall exceed four thousand dollars." If the income exceed \$4,000, it is not clear whether the whole income or only the excess over \$4,000 can be taken. At any rate, whatever is not exempted by this statute comes under the general doctrine of equity, and what that is held to be in New Jersey appears in the preceding section. The statute is interesting as being the first attempt to limit the protection of a spendthrift trust to a defined amount, though the limit seems absurdly high. *Halstead v. Westervelt*, 41 N. J. Eq. 100. *Hunterdon Freeholders v. Henry*, Id. 388.]

¹ Attached to the report of the Chancellor's decision is a long and useful note by the learned reporter.

§ 194. *Arkansas*. — In *Lindsay v. Harrison*, 8 Ark. 302, the point decided in which is stated *supra*, § 171, *note*, the court say (p. 311): “It is impossible to tie up the use and enjoyment of a personal chattel so as to create in the donee an unlimited estate which he may not alien. Even a life estate cannot be so limited and restricted. *Woodmeston v. Walker*, 2 R. & Myl. 197. *Massey v. Parker*, Id. 174. *Brown v. Pocock*, Id. 218. *Brandon v. Robinson*, 18 Ves. 429. Such fetters may be imposed upon the estates of married females, or estates settled upon females in contemplation of marriage during coverture, but they cease upon the determination of the coverture.”

§ 194 *a*. *Wisconsin*. — In this State the language of the cases leaves the law in doubt. In *Bridge v. Ward*, 35 Wis. 687, 690, as to which see §§ 24, 134, *ante*, the Court cite with approval the language of 2 Redfield on Wills, 668, — that property cannot be given either for life or absolutely without the power of alienation being incident to the gift. See *McCleary v. Ellis*, 54 Iowa, 311. [In *Lamberton v. Pereles*, 87 Wis. 449, it was held that an equitable life interest in personalty, where there was no clause against anticipation, could be assigned, the Wisconsin Rev. Sts. (1878), § 2089, applying only to real estate. The Court cite several authorities *pro* and *con* on the validity of restraints on alienation, but do not disclose their own opinion. Trust estates in land in Wisconsin are now governed by statute. See § 296, *post*.]

§ 194 *b*. [In *Sumner v. Newton*, 64 Wis. 210, a testatrix gave property to a trustee, in trust to apply the income for the support of M. for life, and on her death to transfer the principal to S. and H. S. and H. petitioned that the trust

property might be transferred to them, and produced a paper purporting to be signed by M. releasing the estate of the testatrix and the trustee from every claim on account of anything in the will of the testatrix. The trustee opposed the granting of the petition, and the court refused to grant it. (1.) Because M. was not a party to the proceedings. (2.) Because there was "a failure to investigate the circumstances under which the release was executed, the capacity of" M., "and whether or not the execution of this release was a judicious and discreet act on her part." (3.) Because there was a failure to require security for the protection of M., should she hereafter become indigent. Whether, with the consent of the trustee, any of these requisites could be dispensed with, and whether, on a proper case made, the Court could terminate the trust without the trustee's consent, are questions stated in the opinion, but not passed upon. It may well be that no court would sustain a release of a *cestui que trust* to the trustee before the natural termination of the trust without clear affirmative evidence of the good faith and equity of the transaction, but it is hard to see on what ground security could be demanded. The case certainly raises grave doubts whether the Wisconsin Court will not sustain spendthrift trusts.]

§ 195. *Connecticut*. — In this State there are no decisions. The *dicta* are conflicting. In *Donalds v. Plumb*, 8 Conn. 447, a testator devised all his estate, real and personal, to his grandchildren, on the death of his daughter A., the wife of K., and added: "But the use and improvement of my estate I will shall be for the support of my daughter A. and her children during her life; and for that purpose I constitute" D. and said A. trustees "to carry

the same into effect." Held that one who had supplied necessities to A. and her children on the credit of this trust fund could maintain a bill in equity to be paid out of it. [See *Williams v. Robinson*, 16 Conn. 517, 523.]

§ 196. *Leavitt v. Beirne*, 21 Conn. 1. Property was devised to a married woman, M., for the exclusive use of herself and her children, free from the debts and control of her husband; and to secure the same to their unimpaired enjoyment, he gave the property in trust, with full authority to apply the property as to the trustee should seem best for their exclusive benefit during the life of M.; and on her death to divide the same among her children. It was held (by three judges to two) that the principal of the trust fund was not liable for debts contracted by M. This case is important here only for a *dictum* of Waite, J. He says (pp. 8, 9): "A man may have a son so fallen into vicious habits as to be utterly unfit for the management of any property. A gift to him might be worse than useless. That son may have a wife and children whom he entirely neglects. The father [may] be both able and willing to make ample provision for them, and save them from being a public burden. But he can do nothing through the instrumentality of his son. But may he not, through the intervention of trustees in whom he can confide, and place property in their hands for the benefit of his son and family beyond his control?" [See *Tarrant v. Backus*, 63 Conn. 277, 287.]

§ 197. *Farmers' Savings Bank v. Brewer*, 27 Conn. 600. Property was devised to trustees in trust to pay the income to W. semiannually for life, with a gift over on his death. Held that W.'s equitable life interest was assignable. The Court say (pp. 606, 607): "We have

no occasion to consider the question that has been made before us, as to the effect of a provision against alienation."

§ 198. *Easterly v. Kēney*, 36 Conn. 18. Devise to a trustee in trust "to pay to A., and this devise is for the purpose of securing to said A. the rents, use, and benefits of said devise, exclusive to all other persons. Said trustee is hereby directed to pay to said A., or to his written order, made annually, the rents, profits, and issues of said building hereby devised; and this devise is not to enure, in any manner, for the use and benefit of any creditors of said A., but is hereby intended to be for the only use and benefit of said A., and for such use and purpose only as he shall annually appoint." The Court said: "If an equitable or legal interest in land is devised, and it becomes vested in the devisee, it is subject to all the incidents of ownership in his hands, and may be taken by creditors, as freely as any other property of the debtor, although the testator may have strongly expressed his intent to the contrary." "The clause in the devise, that the rents and profits shall in no case enure to the benefit of the creditors of Goodwin, can have no effect. If the income was his, it was his for all purposes, like any other property. The testatrix should have conferred upon the trustee discretionary power of appropriation, if she desired to deprive the *cestui que trust* of ownership of the rents and profits before they should be paid to him." (pp. 19, 22.) It was held that rents and profits in the hands of the trustee could be reached by foreign attachment; but that there was no law or practice that would enable a creditor, by the aid of a petition, to seize rents and profits that might hereafter accrue or come into the hands of the trustee.¹

¹ [The court held that A. had an equitable life estate, but did he not really take an equitable fee?]

§ 199. This opinion shows : (1.) That a creditor cannot, in Connecticut, reach an equitable interest in rents and profits not yet accrued ; *but this has nothing to do with any restraint imposed upon the alienation of such interest* ; if no restraint had been imposed, the result would have been the same. The rents and profits yet to accrue cannot be reached, because they are an equitable future interest, not because they are an inalienable interest (see § 170, *ante*). (2.) That an assignee, either voluntary or in bankruptcy, would take the entire interest of the *cestui que trust* in the rents and profits, “like any other property,” despite any intended restraints. There is no judgment on this last point, it is true, for the case did not arise ; but the opinion leaves no doubt as to the views of the court, and makes it clear that the *dictum* cited above from *Leavitt v. Beirne*, § 196, *ante*, is not now law in Connecticut, if indeed that *dictum* means anything more than that, by giving a trustee discretionary power to whom to pay a trust fund, it may be protected against the debts of any particular *cestui que trust*.

§ 199 *a*. [*Clement's Appeal*, 49 Conn. 519. A testator gave a share of the residue of his estate to A., in trust to pay over the use, income, and rents thereof, from time to time, at his discretion, to B., for and during the period of his natural life, for the comfort and support of himself and family, and at the decease of B. to pay and deliver over the same in equal portions to his children. B. became insolvent, and made a compromise with his creditors. A. was one of these creditors, and received his dividend and also a note from B. for the balance of his debt. The Court found that this note was void as given in fraud of the other creditors. A. paid himself the amount of the note out of

the income of the fund, and charged it to B., who assented to the charge, and never complained of it afterwards. On the settlement of A.'s account, after the death of B., the Court disallowed this payment, on the grounds, first, that B.'s children were entitled to all the income not actually paid to B. for the comfort and support of himself and his family (which seems a questionable construction); and, secondly, that a trustee, having a discretion to pay income to his *cestui que trust* from time to time, cannot, even with the *cestui que trust's* assent, pay himself an invalid claim of his own against the latter out of the income of the trust fund.]

§ 199 *b.* [*Tolland County Ins. Co. v. Underwood*, 50 Conn. 493. The will of a testator was to the effect that he gave to his wife all the income of his estate, and so much of the principal as might be necessary for her support and maintenance, and the support, maintenance, and education of his daughters during her life. The plaintiff recovered a judgment against the wife for \$418.83, and filed a lien to secure the same upon the land devised by the will. There were two single and one married daughter living. The personal estate had been exhausted, and the real estate remaining was worth about \$3,400. On a suit to enforce the lien, the Court held that the wife took a life estate in trust, and that her interest was not separable from that of the daughters, and could not be reached by the plaintiff. The *dicta* of *Carpenter, J.*, go much further. He says, speaking of exceptions to the rule, that all a man's property is liable for his debts: "All property exempt by statute from attachment is within the exception; so is ordinary trust property designed to secure a maintenance for some unfortunate debtor; so

also the income of trust property, where it is payable to the beneficiary at the discretion of the trustee." And again: "While a court of equity will lend its aid to appropriate the surplus of trust funds, after affording a reasonable support to the *cestui que trust*, to the payment of his debts, yet we apprehend that it will not interfere to deprive a widow of a pittance, confessedly too small for her support, left by her husband for that purpose. In *Genet v. Beekman*, 45 Barb. 382, the marginal note is: 'It is only in cases where a clear surplus will exist, after a reasonable sum has been appropriated to the support of the person for whose benefit a trust was created, that courts of equity are authorized to interfere in behalf of judgment creditors, and divert a portion of the income or annuity to the payment of the debts of such person.' " In *Genet v. Beekman*, the Court was expounding a New York statute (Rev. Sts. part 2, c. 1, tit. 2, art. 2, § 57) which expressly provides for creditors reaching the surplus of a fund held in trust for a debtor beyond what may be necessary for his education and support; but, apart from statute, it would not seem that either in those jurisdictions where spendthrift trusts are sustained or where they are condemned can a court of equity set aside out of a trust fund what is necessary for the support of a *cestui que trust*, and hand over the rest to his creditors. See *Tarrant v. Backus*, 63 Conn. 277, 284. Cf., however, *Leigh v. Harrison*, 69 Miss. 923, § 240 *m, post*; *Nickell v. Handly*, 10 Grat. 336, § 245, *post*.]¹

§ 213. Thus far we have seen that in eight States

¹ [§§ 200-211 in the first edition contained a statement of the law in Kentucky, which is now to be found §§ 190 *a*-190 *l, ante*; and § 212 gave the law as it then stood in Vermont; see § 240 *n, post*.]

(Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Ohio, [and Kentucky]) there are decisions against the validity of restraints on the alienation of equitable life estates (§§ 179–190 *l, ante*) ; that in two States (New Jersey and Arkansas) there are *dicta* to the same effect (§§ 191–194, *ante*) ; and that in Wisconsin and Connecticut the *dicta* are conflicting (§§ 194 *a*–199 *b, ante*). [The only States, at the date of the former edition, in which restrictions upon the alienation of equitable life estates had been held valid were Pennsylvania and Massachusetts.]

§ 214. *Pennsylvania*. — The law in Pennsylvania on this subject at the time of its adoption was opposed to that held in every other country within the domain of common law and equity. In that State, property given to trustees for the support of a man or unmarried woman is not liable for his or her debts. This peculiar doctrine is the not unnatural result of local causes. Its history is as follows. In Pennsylvania there were formerly no courts of equity. If a man had equitable rights, he had no remedy to enforce them. The natural consequence of this was that many rights, which in countries where courts of equity were established would be deemed equitable only, were in Pennsylvania, for the sake of giving a remedy, regarded as legal.

§ 215. Equitable rights in property were turned in Pennsylvania into legal rights, in two ways: — *First*. By emphasizing the distinction between active and passive trusts, and by giving the legal estate, whenever the trust was passive, to the *cestui que trust*. This doctrine went far beyond the Statute of Uses, for (1.) whenever a use was limited upon a use, although in England the lat-

ter use is not executed, in Pennsylvania it was; and (2.) although the Statute of Uses does not apply to personal property, yet in Pennsylvania personal property held by A. on a passive trust for B. became the legal property of B.¹

§ 216. *Secondly.* By considering as passive trusts many which are elsewhere held active; for instance, upon a trust to receive and pay over to X., X. would be held in Pennsylvania to have a legal interest. See *Rife v. Geyer*, 59 Pa. 393, 396. So upon a trust to convey. *Nice's Appeal*, 50 Pa. 143. *Bacon's Appeal*, 57 Pa. 504. [*Harkinson v. Bacon*, 3 W. N. C. (Pa.) 403. *Armstrong's Estate*, 9 W. N. C. (Pa.) 289.] Bispham, Eq. § 55.

§ 216 *a.* [Further, not only were rights regarded elsewhere as equitable held in Pennsylvania to be legal, but legal remedies and process were extended in that State to interests to which they were elsewhere deemed inapplicable,² and, notably, equitable interests could be taken in Pennsylvania on execution. The cases in which this was originally done seem by the reports to have been instances of the sale of real estate in which the vendee had not taken a deed, but the language of the books has always

¹ In apparent conflict with this are the cases, so frequent in Pennsylvania since the introduction of equity, brought by *cestuis que trust* against their trustees for a conveyance; but the Court has said that conveyances have been ordered in these cases, not because the *cestuis que trust* have not had the legal interest, but in order to give them marketable titles. *Kay v. Seates*, 37 Pa. 31, 40. *Bacon's Appeal*, 57 Pa. 504, 513. *Rife v. Geyer*, 59 Pa. 393, 396. *Westcott v. Edmunds*, 68 Pa. 34, 37. See *Kuhn v. Newman*, 26 Pa. 227, 233.

² [So ejectment was and is the remedy to enforce specific performance of a contract to convey land. See *Peebles v. Reading*, 8 S. & R. 484; *Henderson v. Hays*, 2 Watts, 148; *Presbyterian Congregation v. Johnston*, 1 W. & S. 9, 56; *Christy v. Brien*, 14 Pa. 248. Cf. *Kennedy v. Fury*, 1 Dall. 72.]

been that all equitable interests in land can be taken on execution; the doctrine is, however, confined to land. *Curkhuff v. Anderson*, 3 Binn. 4, 8, 9. *Auwerter v. Mathiot*, 9 S. & R. 397. *Rickert v. Madeira*, 1 Rawle. 325, 329. *Pullen v. Rianhard*, 1 Whart. 514, 522. *Thomas v. Simpson*, 3 Pa. St. 60, 69. *Russell's Appeal*, 15 Pa. 319. *Webb v. Dean*, 21 Pa. 29. *Drake v. Brown*, 68 Pa. 223.

§ 217. [When, therefore, spendthrift trusts made their appearance in Pennsylvania, the interests of the *cestuis que trust* could not be reached in equity, because there was no court of chancery, and the only way they could be reached was by taking them on execution at law. Now it had been a great stretch to allow executions to operate against equitable interests of any kind, and the courts may well have relucted at extending executions to the case of the complicated interests and rights of a *cestui que trust* under a spendthrift trust.] Afterwards the courts of Pennsylvania gradually acquired equity jurisdiction, and the natural result was that they began to look at trusts as they were regarded elsewhere; but the hold of spendthrift trusts was too strong to be shaken off, though there are not wanting signs of regret on the part of Pennsylvania judges that they were ever established. See § 234, *post*.

§ 218. What is above stated seems the most probable account of the origin of spendthrift trusts in Pennsylvania; but the law of trusts in that State is confused in the extreme, and the fluctuation of judicial opinion has been great. A few of the cases illustrating it are *Kuhn v. Newman*, 26 Pa. 227; *Kay v. Scates*, 37 Pa. 31; *Barnett's Appeal*, 46 Pa. 392; *Bacon's Appeal*, 57 Pa. 504; *Rife v. Geyer*, 59 Pa. 393; *Dodson v. Ball*, 60 Pa.

492; *Ogden's Appeal*, 70 Pa. 501; *Earp's Appeal*, 75 Pa. 119; *Huber's Appeal*, 80 Pa. 348; *Williams's Appeals*, 83 Pa. 377; *Hartley's Estate*, 13 Phil. 392. For a collection of the authorities see Bispham, Eq. (5th ed.) § 55.

§ 219. The establishment of spendthrift trusts in Pennsylvania appears to have been largely due to the influence of Chief Justice Gibson. The interference of equity to compel people to pay their debts seems to have moved the wrath of that sturdy common lawyer. "Nothing in the law," he says, "is more to be deprecated than those decisions in which the right of a *cestui que trust* to dispose of his estate has been recognized." *Lancaster v. Dolan*, 1 Rawle, 231, 247; and see *Holdship v. Patterson*, 7 Watts, 547, 551. It is to him that Pennsylvania owes the doctrines, (opposed to the great weight of authority elsewhere,) that a married woman can charge her separate estate only so far as she is authorized by the instrument creating it; *Lancaster v. Dolan*, *ubi supra*; [see § 275 *b*, *post* ;] and that property appointed under a general power to a volunteer is not assets for the payment of the appointor's debts. *Commonwealth v. Duffield*, 12 Pa. 277. [*King's Estate*, 16 Phil. 306; 14 W. N. C. 77; *s. c. sub nom. Swaby's Appeal*, 14 W. N. C. 553.]

§ 220. The series of cases is as follows. *Fisher v. Taylor*, 2 Rawle, 33 (1829). Devise to executors "in trust for my son S., the said S. to have the rents, issues, and profits thereof, but the same not to be liable to any debts contracted, or which may be contracted, by the said S." It was held that this trust was active; that the legal estate was in the executors; and that S. had no interest which could be taken on execution at law.

§ 221. *Holdship v. Patterson*, 7 Watts, 547 (1838).

Personal property was given by A.'s friends to A.'s daughter to carry on business for the support of her father's family, and she agreed to give A. a reasonable support. Held that the property could not be taken on execution for A.'s debts.

§ 222. *Hamersley v. Smith*, 4 Whart. 126 (1838). A testator directed that money should be invested by his executors in trust for the sole use of A. A. was married at the testator's death, her husband died, and she married again. Held that she and her husband could assign the fund, there being no restraint on anticipation.

§ 223. *Ashhurst v. Given*, 5 W. & S. 323 (1843). Property was devised to A., with full powers of management, in trust for such children as A. might have at his death, and, if he should die without issue, for the testator's heirs, and the testator directed that A., for his services in managing the trust property, might be allowed a reasonable support out of the trust fund. It was held that the trust property could not be taken on execution for the debts of the trustee.

§ 224. *Vaux v. Parke*, 7 W. & S. 19 (1844). Land was devised to trustees in trust to pay the income to A. or his appointee during the life of A., and on A.'s death to his appointee, with power in the trustees, if A. should be so relieved from embarrassment as to make it expedient, to convey to him in fee. It was held that A. had no legal estate that could be taken on execution at law. The Court add: "We give no opinion how far such a right as he had could be reached by his assignees, or by other proceedings on behalf of creditors."

§ 225. *Norris v. Johnston*, 5 Pa. 287 (1847). Land was devised to trustees in trust to pay the income to A.

for life. The testator added: "This share of my estate, excepting the interest thereof, shall not be subject" to A.'s contracts or debts. Held that A. could assign his life interest.

§ 225 *a*. [*King's Estate*, 9 Leg. Int. 140 (1852). This case in the Orphans' Court is so imperfectly reported that it is impossible to determine the point decided. It seems to have been held that the interest of a *cestui que trust* in a trust fund was not liable for his debts, because of discretionary powers in the trustees; but what those powers were does not appear.]

§ 226. *Brown v. Williamson*, 36 Pa. 338 (1860), presents precisely the same question as *Ashhurst v. Given*, § 223, *ante*; and to the same effect is *Boyd's Appeal*, 2 W. N. C. 204. *Rees v. Livingston*, 41 Pa. 113 (1861), is the exact case decided in *Holdship v. Patterson*, § 221, *ante*. In *Mackason's Appeal*, 42 Pa. 330 (1862), it was held that a man cannot settle his own property on himself so that his creditors will be unable to reach it. [This was followed in *Andress v. Lewis*, 17 W. N. C. 270, and *Lewis v. Miller*, 21 W. N. C. 94, and in *Ghormley v. Smith*, 139 Pa. 584, on deliberate consideration, was confirmed. See also *Stewart v. Madden*, 153 Pa. 445.] See *Mead v. Penn Co.*, 5 Leg. & Ins. Rep. 107, cited 2 Brightly's Pa. Dig. (1877), p. 2324. In *Still v. Spear*, 45 Pa. 168 (1863), [and *Osborne v. Soley*, 2 W. N. C. 533,] it was held that the principal of a trust fund cannot be taken by garnishee process for the debt of one having only a life interest; [see also *Mannerback's Estate*, 133 Pa. 342;] and *Barnett's Appeal*, 46 Pa. 392 (1864), cites several *dicta* in favor of spendthrift trusts, but the decision does not touch the matter.

§ 227. *Girard Ins. Co. v. Chambers*, 46 Pa. 485 (1864). Property was held by A. in trust to pay the income to B. for his life, for his own use and benefit, or to such person as he might authorize. A. was summoned on attachment execution as garnishee of B., and the Court held that the income of the trust fund accrued in the hands of A. at the date of the attachment could be taken under it. A statement in the opinion, that the Court would give "the income during the life of the son to the attaching creditor" (p. 492), is calculated to give the impression that the creditor was entitled to income not yet accrued. But this would be a mistake. There is no machinery in a foreign attachment or attachment execution for reaching income not yet accrued;¹ and the order at the close of the case shows (see p. 488) that only the accrued income was taken by the attaching creditor. This income accrued was a legal debt from the trustee to B., and, like any other legal debt, could be reached by garnishment. [See also *Park v. Matthews*, 36 Pa. 28; *Kinney v. Hemphill*, 2 W. N. C. 323; *Harrison v. McCana*, 11 W. N. C. 239; *Estate of McCann*, 16 Phil. 224.]

§ 228. On these decisions (§§ 220–227, *ante*), if made in any other jurisdiction, no criticism could justly have been passed. There was no departure in them from the generally received doctrines of law or equity. They would have been determined, in the absence of statute, in the same way in any other of the United States, or in England. [It was only because executions at law were allowed in Pennsylvania against equitable interests gen-

¹ [Or, to speak more accurately, income to accrue after judgment against the garnishee. *Sheetz v. Hobensack*, 20 Pa. 412. *Harrison v. McCana*, 11 W. N. C. 239. Sergeant on Attachment, 108–112.]

erally, while they were denied against spendthrift trusts, that any of the foregoing cases can be considered as decisions in favor of the validity of the latter. It must be admitted, however, that the *dicta* of the judges were often in their favor.] See the language of Coulter, J., in *Norris v. Johnston*, 5 Pa. St. 287, and Bell, J., in *Eyrick v. Hetrick*, 13 Pa. St. 488.

§ 229. *Shankland's Appeal*, 47 Pa. 113 (1864). Devise to trustees to collect the rents, and pay over the same to A. for life, without being subject to his debts or liabilities, and on his death over. A. agreed to sell, and B. agreed to buy, all A.'s "estate, right, and interest" under the testator's will, "being at least an estate for the term of his own life, . . . or the right to receive" the rents of the property devised during his life, for the consideration of \$1,200, to be paid on the execution "of a good and valid conveyance or assignment of all and singular the premises" by A. to B. during A.'s life. B., discovering the nature of the trust, refused to carry out the agreement, and A. brought a bill for specific performance. The Court dismissed the bill. Read, J., giving the opinion of the Court, said that no creditor could touch the income. The bill was probably rightly dismissed, on the ground that it was the belief and expectation of the parties that the legal title was to be transferred. See p. 115. If the case cannot be supported on this ground, then here for the first time, the Supreme Court of Pennsylvania made an actual decision in equity in favor of spendthrift trusts.

§ 230. *Keyser's Appeal*, 57 Pa. 236 (1868). A restriction on a devise in fee to A. in trust for B., that the land should not be liable for B.'s debts was held void. See §§ 115, 124 *a*, *et seqq.*, *ante*.

§ 231. *Rife v. Geyer*, 59 Pa. 393 (1868). Devise to B. and his heirs in trust, from time to time, to let and demise the land devised, recover and receive the rents, and pay over the same when received into the hands of S., or such person as he might authorize, or, at B.'s option, to permit and suffer S. to let, demise, occupy, and enjoy the said land, and receive and take the income thereof, during his life, for his own separate use, and so the same should not be in the power, or liable to the debts, control, or engagements of S., and on the death of S. to hold the land in trust to and for the only proper use, benefit, and behoof of the heirs of S. B. conveyed the land to S. by a deed purporting to pass the fee. The question was whether S. took a fee simple by virtue of the Rule in *Shelley's Case*. As S. had an equitable life estate, and his heirs a legal remainder in fee, the rule of course did not apply. And matters were not helped by the conveyance of the trustee's legal life estate to S.; for, although S. then had the legal life estate and the legal remainder, they did not vest in him by the same conveyance, and therefore did not come within the Rule. *Fearne*, C. R. 71. This is all that the decision comes to, although Sharswood, J., in delivering the opinion of the Court, affirmed the validity of spendthrift trusts.

§ 231 *a.* *Cridland's Estate*, 7 Phil. 58 (1868). The nature of the proceedings and the facts of the case are not given; so that it is impossible to tell what was the point decided. As the case was in the Orphans' Court only, the decision, if known, would be of slight authority.

§ 232. *Keyser v. Mitchell*, 67 Pa. 473 (1871). Property was given by will in trust to collect the income, and to pay it, "or so much thereof as the trustee may think proper and

expedient, under all the circumstances of the case, to and for the maintenance and support of my son Charles, during all the term of his natural life, with the intent and purpose that the said trustee may either pay the said income, or such portion thereof as he may think proper, into the hands of my said son, or disburse the same in such way as to the said trustee may seem best for his comfortable support and maintenance, such payments and disbursements to be at all times at the sole and absolute discretion of the said trustee." It was held that the trustee could not be summoned as garnishee of Charles. The decision in this case seems open to no remark; for here not merely the manner and time in which Charles was to receive the income, but the amount to be received, was in the discretion of the trustee, and therefore, in accordance with all the authorities, as Charles had no right to any sum, his creditors could have none. [See *Horwitz v. Norris*, 49 Pa. 213, 222; *Huber's Appeal*, 80 Pa. 348.]

§ 233. *Buckman v. Wolbert*, 9 Phil. 207 (1874); s. c. *sub nom. Buchman v. Wolbert*, 2 W. N. C. 438. Devise to trustees in trust to pay the income to J. for life, the same not to be in any way liable for any present or future indebtedness of J.'s, with a gift over. It was held that the accrued income of this trust fund could not be reached by an "attachment execution" against J.

§ 234. *Overman's Appeal*, 88 Pa. 276 (1879). A testator directed that the income paid to his children by his executors should be free from his children's debts. A son was one of the executors. Upon the filing of the executors' account, they were surcharged in such an amount that the interest thereon exceeded the son's share of income. At the first hearing it was held that the son's share of

income must be set off against his indebtedness on the executors' account. On a rehearing the decision was reversed, the Court saying that there was no difference between one kind of liability and another. It is hard to see, under the Pennsylvania doctrine of spendthrift trusts, how this result could be avoided; but it is worth while to note the language of Chief Justice Agnew, who delivered the opinion of the court on the first argument, because it shows how experience has taught some of the judges in Pennsylvania to regard the doctrine of spendthrift trusts. He says: "It [a spendthrift trust] is exceptionable in its very nature, because it contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. . . . A trust to pay income for life may last for the longest period of human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed [*qu. dead*] of a former period, or that the non-payment of debts should be encouraged."

§ 234 *a*. The learned reader's attention is again called to the fact that until *Overman's Appeal*, in the year 1879 (with the possible exception of *Shankland's Appeal*, § 229, *ante*,) the only question determined by the Supreme Court of Pennsylvania on the matters here discussed was how far the operation of an execution at law should be extended

over equitable interests, and that all the cases before that time by which that Court is supposed to have established the doctrine of the validity of spendthrift trusts might and would have been decided as they were by a court which utterly repudiated that doctrine, — the English Court of Chancery, for example.

§ 235. In *Overman's Appeal*, the Court thought itself forced by its previous *dicta* and decisions to hold that the share of a child in the paternal property was not liable to make up to his brothers and sisters the shares of which his gross mismanagement had deprived them. It is small wonder that to some of the judges,¹ as appears by the opinion of Chief Justice Agnew, the doctrine now shows itself in another guise from that which it bore when it was welcomed as “favored and sustained by the law, as suggested by the best feelings of our nature, and doing harm to no one.” See 13 Pa. 491, and 5 Pa. 289. It would seem that courts of other States, which are asked to support spendthrift trusts on the authority of the Pennsylvania Supreme Court, may well hesitate to adopt a doctrine which the Chief Justice of that Court has declared to contravene that general policy of the law “which forbids restraints on alienation and the non-payment of honest debts.”

§ 235 *a.* [In *Thackara v. Mintzer*, 100 Pa. 151, it was held that a spendthrift trust was good as against a claim for alimony, and in *Guardians of the Poor v. Mintzer*, 16 Phil. 449, under the same trust, it was held by the Quarter Sessions of Philadelphia that the income could not be taken for the support of the wife and children of the *cestui que*

¹ Not to all, however. Mr. Justice Woodward still thinks that these trusts have “produced beneficent and just results.” (88 Pa. 286.)

trust, who had deserted them. But in *Decker v. Directors of the Poor*, 120 Pa. 272, land was devised to a trustee in trust that he should, every six months, pay over to D. all the rents of the land, and the trustee had the power, with the written consent of D., to sell the land and pay over the proceeds to D., thus terminating the trust. The Supreme Court held that this income could be taken for the support of D.'s wife and child, whom he had deserted. The trust here would hardly seem to have been a spendthrift one, but the Court say, "It is unnecessary to determine what is the nature and extent of" D.'s "interest in the land or the proceeds thereof." And in *Board of Charities v. Moore*, 6 Penn. C. C. 66, 19 Phil. 540, where property had been devised to trustees in trust to pay the income quarterly to the testator's three children "without being in any wise liable to or for any debts, claims, liabilities, contracts, or obligations they or either of them" might make, "and so that the same shall not be diverted from his or her personal use and maintenance, and the maintenance of the wife (if any) and minor children of either of my said sons," the Quarter Sessions of Philadelphia held that the income could be reached for the benefit of the wife and minor son of one of the testator's sons, and, out of an income of \$4,000, \$1,200 was ordered to be paid by the trustee for the benefit of the wife and son. A like decision was made by the same court in *Board of Charities v. Kennedy*, 34 W. N. C. 83.]

§ 235 *b*. [The Pennsylvania statute of April 18, 1853, § 9, is, in its general scope, similar to the Thelluson Act, and forbids accumulations except during actual minorities. On the effect of this upon spendthrift trusts, see Gray, Rule against Perpetuities, §§ 720-722 *b*, and authorities there

cited, and also the late cases of *Eberly's Appeal*, 110 Pa. 95; *Schwartz's Appeal*, 119 Pa. 337; *Brooks's Estate*, 140 Pa. 84; *Hibbs's Estate*, 143 Pa. 217; *Ashhurst's Estate*, 18 Phil. 37; *Lutz's Estate*, *Id.* 114; *Mitcheson's Estate*, 5 Pa. C. C. 99; *s. c.* 22 W. N. C. 46; *Levy's Estate*, 1 Pa. Dist. Ct. 217.]

§ 235 c. [*Stambaugh's Estate*, 135 Pa. 585. A testator directed that property should be placed in the hands of S., whom he appointed trustee, to hold the sum for M., S. to pay the interest yearly accruing from the same to M. after deducting taxes and necessary expenses, and upon the death of M. over. M. had failed and made an assignment for his creditors shortly before the making of the will. The Court held this to be a spendthrift trust, at any rate as between trustee and *cestui que trust*; and that if the trustee paid over the principal of the trust fund on the order of M. and the remaindermen, he was still liable to M. for the income. This case goes farther than any other decision in Pennsylvania has yet gone, and stops little short of deciding that every equitable life interest is inalienable.]

§ 235 d. [But in *Kuntzleman's Estate*, 136 Pa. 142, property was given by a testator to trustees in trust for his sons, not to be subject to their debts, and also other property to trustees in trust to invest the property and pay the income to his daughter, then five years old, for her sole and separate use, upon her separate receipt, without the control or interference of any husband, and upon her death over. The Court held that for the sake of the remaindermen this trust for the daughter must be considered as active, but there is a *dictum* that it was intended as a trust for coverture and not as a spendthrift trust.]

§ 235 e. [Again in *King's Estate*, 147 Pa. 410, a testa-

tor gave property to a trustee in trust to invest, to collect the income, and to pay it over to the testator's wife during her life, but upon her sole separate receipt or order in writing, to be from time to time and not by anticipation given, and at her death to pay over as she might by will appoint; and he directed that the trustee should see that none of the income should go or be paid, directly or indirectly, to any of his wife's collateral relatives, and that the trustee should not permit them to enter the testator's house. The will was in dispute, and the trustee did not collect the income, but he advanced money to the widow from time to time, not faster, however, than it was in fact accruing. The Court held that when he did collect the income he could retain against his advances. This may be right, but the language of the Court is remarkable. The *cestui que trust*, they say, "was as much in fault, in violating the clause against anticipation, as the trustee was in making payments. She has, therefore, no equity to be heard against her own wrongdoing, and we regard her as estopped from saying she had no right to receive the money on account of the clause against anticipation." Such a line of argument is destructive of spendthrift trusts altogether.]

§ 235 *f.* [*Mehaffey's Estate*, 139 Pa. 276. A testator devised land to E. in trust to let it, receive the rents and pay them over to M. "or to such person or persons as he may authorize to receive the same, or at the option of said trustee to permit him to occupy and enjoy" the land for life, "for his own separate use, so that the same shall not be in his power or liable to his debts, contracts, or engagements." A share of the residue of the estate was also directed to be held by the executors in trust to pay the

income one half to C. and one half to M. for life, "or to such person or persons as they shall severally authorize to receive the same, without any liability for any debts, contracts, or engagements which they may make." After the death of the testator, M. gave S. an order on the trustee to pay the amount of a judgment which had been recovered before the testator's death. *Held*, that S. was not entitled to receive from the trustee income accrued after the date of the order.]

§ 235 *g*. [*Hahn v. Hutchinson*, 159 Pa. 133. A testatrix gave all her property to her husband "in trust, he to have the entire control, so long as he may desire, of the same, and use so much of the income thereof as he may desire, but I especially direct that the same shall not be subject to or liable for the payment of any individual debts that he may now owe or hereafter contract," or to any process for the collection of the same, but "is to be paid into his own hand, and cannot be anticipated, sold, or pledged." He was to have entire control of the trust estate, was not to be called upon for an account, and could by will change the proportions of the gifts to the children of the testatrix made in the will. It was held that the husband's interest was liable for his debts. See § 134, *ante*.]

§ 235 *h*. [On spendthrift trusts see also *Barker's Estate*, 159 Pa. 518, § 124 *h*, *ante*; *Oakford's Estate*, 4 Pa. C. C. 465; *Brubaker v. Huber*, 13 Pa. C. C. 78.]

§ 236. *Massachusetts*. — The Massachusetts cases are as follows: — *Braman v. Stiles*, 2 Pick. 460. A testator devised his property to his children, but directed that the share of his son Jonas "shall be deposited by my executor in the hands of my sons Luther Stiles and Barney Stiles, and be retained by them, and dealt out to the said Jonas

for his comfort and advantage, according to their best judgment and discretion." He gave his executor power to sell all of his real estate. The share of Jonas in the real estate was attached by his creditors. Subsequently the executor sold all the testator's real estate under the power. It was held that, whatever the interest of Jonas in the real estate might be, it was divested by the executor's exercising the power. The case derives its importance entirely from a *dictum* of Parker, C. J. He says (p. 464): "Nothing can be more clear than that the testator, by these words, intended that his sons Luther and Barney should be the trustees of Jonas as to everything which was the subject matter of this provision; and such intention was lawful, for he, having the power of disposing of his property as he pleased, had a right to prevent it from going to the creditors of his son, or from being wasted by the son himself, if, as was probable, he had become incapable of taking care of property. Creditors have no right to complain; for unless such disposition can be made, without doubt testators in like situations would give their property to their other children." This remark, that an equitable *interest in fee simple* (not a life interest) can be kept from the creditors of the *cestui que trust*, is contrary to the whole weight of decision, even in Pennsylvania. There is absolutely no authority for it whatever. See §§ 122, 123, *ante*. [But see now §§ 124 a-124 k, *ante*.]

§ 237. In *Perkins v. Hays*, 3 Gray, 405, a testator directed his executors to pay an annuity to his wife on her separate order, and, in case of her incapacity, through sickness or any other cause, to receive the payments herself or upon her separate order at any time during her life, then to pay the same to any persons lawfully appointed to rep-

resent her, and in default of such appointment then to apply the same to the support and maintenance of his wife, and the support, maintenance, and education of his children under twenty-one, and on her death over. The widow married again, and assigned the annuity to pay her second husband's debts. It was held that she was restrained from anticipating her annuity. The case does not really bear on the question under consideration, as the annuitant was a *feme covert* at the time of the assignment, and the only matter in discussion was whether the restraint on anticipation which could have been imposed was so imposed in fact.

§ 238. *Pulmer v. Stevens*, 15 Gray, 343. A testator devised property to trustees in trust to pay to his son, for his sole use, on his sole receipt, the income thereof, and also any part of the principal, if necessary for the comfort, support, and education of himself or children, with remainder over. It was held that the principal could not be assigned by the son, because his only right was upon a contingency which might never happen, and until that contingency the right was in the remaindermen; but that, "on the other hand, his right to the income annually is complete and absolute, and as much subject to his disposal as any other interest in property; *Foley v. Burnell*, 1 Bro. C. C. 274; *Brandon v. Robinson*, 18 Ves. 429;" and that therefore an assignment of the income was good.

§ 239. *Ames v. Clarke*, 106 Mass. 573. A testatrix gave to W. an annuity to be paid by her executor quarterly, and directed "that no part of this bequest, while remaining in the hands of my executors, shall ever be liable for any of the debts of" W. W. assigned the annuity to G. and the executor made the quarterly payments to G.

Held that W. could not recover the amount of these payments as arrears from the executor. [Is this case to be considered as overruled by *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *post*? See *Beck's Estate*, 133 Pa. 51, § 124 *e*, *ante*; *Goe's Estate*, 146 Pa. 431, § 124 *f*, *ante*.]

§ 240. *Hall v. Williams*, 120 Mass. 344. Devise to trustees to pay the income to the testator's children, provided that, if either of them "shall be wanting in thrift and care, or a sound discretion in the use of money, or the guardian or guardians, or other representatives, of either of them, be in doubtful relations as to his, her, or their judgment and discretion as to the proper use of money, in each and every such case the trustees and trustee for the time being are hereby ordered and charged with paying and disbursing the same in such way and ways as shall be most likely to make the same enure and be beneficial to such recipient's husband, wife, child or children, or otherwise beneficial to such recipient in the way of his or her education, or advancement, or support, exercising in all such case and cases the judgment that would be to be expected from a good father to each of such recipients respectively." Held that this income was not liable to be reached for the debts of any of the children. This decision is entirely in accordance with the English cases, there being no certainty as to the person entitled to the income. See *Brigden v. Gill*, 16 Mass. 522; *Chase v. Chase*, 2 Allen, 101; *Williams v. Bradley*, 3 Allen, 270; *Loring v. Loring*, 100 Mass. 340; *Minot v. Tappan*, 127 Mass. 333.

§ 240 *a*. *Sparhawk v. Cloon*, 125 Mass. 263. Devise by a woman to C. in trust "for the sole use and support" of P., the husband of the testatrix. The trustee was empowered "to relieve himself from trouble and care by appoint-

ing my husband his agent or attorney. A receipt or a written assent, signed by my husband, shall free said trustee from legal liability for any money paid by him, or for any act he may perform as my trustee;" and the trustee was directed "to convey by deed any part or all of my estate to such associations, person or persons, as my husband may designate and propose hereafter by certified written authority, leaving with my husband to fix the time of any such conveyance." It was held that the husband's interest could be reached by a creditor on a bill in equity. As the interest was absolute, the decision could hardly be otherwise.¹ The opinion states the question whether an equitable life estate can be made inalienable or free from debts, and cites several cases as authorities on one side or the other, but gives no intimation of how it should be decided. It is noticeable, that, of the eight cases cited by the court as supporting the validity of such restrictions, not one (not even *Rife v. Geyer*, 59 Pa. St. 393, § 231, *ante*) contains anything except *obiter dicta* to that effect; and indeed, at the time of this decision, *White v. Thomas*, 8 Bush, 661, § 190 *i, ante*, was probably the only reported case, at any rate outside of Pennsylvania, in which such restrictions had been distinctly held valid.

§ 240 *b*. In Massachusetts, therefore, the only thing in the least tending to support the validity of restraints on the alienation of equitable life estates was the *dictum* of Parsons, C. J., in *Braman v. Stiles*, 2 Pick. 460, 464, § 236, *ante*. (The slight weight to be attached to this

¹ If this decision does not overrule *Russell v. Grinnell*, 105 Mass. 425, § 120, *ante*, it shows that that case is no authority for the proposition that equitable fees or absolute interests given for support cannot be reached for debts.

dictum is shown, §§ 122, 123, *ante*.) On the other hand, in *Palmer v. Stevens*, 15 Gray, 343, § 238, *ante*, *Brandon v. Robinson*, 18 Ves. 429, was cited as authority. It may therefore fairly be said that the question had not been determined in Massachusetts when, in 1882, *Broadway Bank v. Adams*, 133 Mass. 170, was decided by the Supreme Judicial Court. In that case A., by will, gave his executors \$75,000 in trust to invest the same and pay the net income thereof to his brother C. "during his natural life, such payments to be made to him personally when convenient, otherwise upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment." On C.'s death there was a gift over. Creditors of C. brought a bill in equity against the executors to reach and apply the income of the trust fund. The Court say that the point presented has never been expressly decided, but that "the tendency of our decisions, however, has been in favor of such a power in the founder. *Braman v. Stiles*, 2 Pick. 460 [§ 236, *ante*]. *Perkins v. Hays*, 3 Gray, 405 [§ 237, *ante*]. *Russell v. Grinnell*, 105 Mass. 425 [§ 120, *ante*]. *Hall v. Williams*, 120 Mass. 344 [§ 240, *ante*]. *Sparhawk v. Cloon*, 125 Mass. 263 [§ 240 a, *ante*]." (p. 171.) They admit that "from the time of Lord Eldon the rule has prevailed in the English Court of Chancery," that such equitable interests can be reached by creditors (p. 172); "but," they add, "the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at

law or in equity." (p. 173.) This departure of the Court from the received doctrines of equity seems to be due to the assumption, that "the only ground upon which it [such a trust] can be held to be against public policy is that it defrauds the creditors of the beneficiary." (p. 173.) The erroneous character of this assumption will be shown in connection with *Nichols v. Eaton*, §§ 253, 259, *post*. The extreme character of this case of *Broadway Bank v. Adams* should be noticed. The trustees had no discretion even as to the mode or time of payment. The *cestui que trust* was entitled, as of right, semiannually, to the income. The case holds that an absolute equitable right to income for life can be freed from alienation or from creditors by simply declaring that it shall be so freed. It extends the provision against anticipation, invented for the protection of married women, to all the world. To regard this as a return to the true principles of law and equity from illogical perversities of Lord Eldon, would, it is submitted, have been impossible to the learned Court, had the history of the doctrine of restraints on alienation as a whole been present to their minds. The grounds of this decision are discussed more fully in the remarks upon *Nichols v. Eaton*, §§ 255 *et seq.*, *post*.

§ 240 *c.* *Foster v. Foster*, 133 Mass. 179. Property was devised to trustees in trust, at their discretion, to pay or apply the income of the fund to the personal benefit or comfort of J., or such member or members of his immediate family as the trustees might think proper, and that such income should not be subject to his debts or assignable by him by way of anticipation. There was in fact a gift over on J.'s death, though this does not appear in the report. Here J. had no right against the trustees, and it was held,

as it would have been held everywhere, that J.'s creditors could not reach the income. See §§ 166, 167, 176, *ante*. On the validity of restrictions against the alienation of an equitable life estate where the life tenant is the settlor, see *Pacific Bank v. Windram*, 133 Mass. 175; [*Jackson v. Von Zedlitz*, 136 Mass. 342, §§ 268 *a*, 277 *a*, *post*].

§ 240 *d*. Until *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*, there was, outside of Pennsylvania, very little in the State courts to support spendthrift trusts, and in Pennsylvania itself judges are now found to lament that they were ever established. *Overman's Appeal*, 88 Pa. St. 276, § 234, *ante*.

§ 240 *e*. [In *Billings v. Marsh*, 153 Mass. 311, the Court refused to make any distinction between an individual creditor and an assignee in insolvency, and held that a spendthrift trust in favor of a debtor could be reached by the latter no more than it could be by the former. And it does not seem as if there were any difference between the cases.]

§ 240 *f*. [*Baker v. Brown*, 146 Mass. 369. A testatrix expressed her desire that her husband should have his support out of her property during his life; "therefore" all the residue of her estate she gave to two daughters "subject to the condition that they support their father during his life." *Slattery v. Wason*, 151 Mass. 266. A testator gave property in trust to pay A. the income during his life, and on his death to pay the principal to A.'s children, provided that, if A. should leave a widow, she should be entitled to her support out of the same so long as she should remain A.'s widow. *Wemyss v. White*, 159 Mass. 484. The trustees, in this case, could "at any time, in the exercise of their discretion, discontinue the payment of the

income, and apply the same in such a way as they deem best for the beneficiary's support and maintenance." It was held in each of these cases that a spendthrift trust had been created.]

§ 240 *f*. [On the other hand, in *Maynard v. Cleaves*, 149 Mass. 307, in which case a testator gave his wife for life the use, income, and benefit of all his estate, real and personal, to be for her support and maintenance, trusting that she would make suitable support for a daughter if unmarried, it was held, after the daughter's death, that the widow's interest could be reached by her creditors. In this case the widow would seem to have had a legal life estate. See § 134, *ante*.]

§ 240 *g*. [*Evans v. Wall*, 159 Mass. 164. A testator gave property to A. in trust for the following purposes: "The income thereof, as it shall become due and payable, and be received by him, to pay over to" B. "for and during her life." Held that an assignee in insolvency of B. could reach this income.]

§ 240 *h*. [When this essay was first published, Pennsylvania and Massachusetts were the only States in which actual decisions in favor of spendthrift trusts had been made, and the weight of authority throughout the country was distinctly the other way. This state of things has greatly changed. In five States, where there had previously been no decision on the question, spendthrift trusts have now been held good, Illinois, Maine, Maryland, Mississippi, and Vermont. (See as to Wisconsin, §§ 194 *a*, 294 *b*, *ante*. In Vermont there had been perhaps a *dictum* in favor of these trusts, in the other States it was a novel question.) In Missouri, although a previous case disallowing a restraint on alienation has not been overruled, it has been supported

on the ground that the settlement was of the beneficiary's own property, and the general doctrine of the invalidity of spendthrift trusts on which that case went has been repudiated. In Tennessee it had been held that spendthrift trusts were invalid, and, overruling previous decisions, that they were not validated by the statutes of the State; but this last determination has in its turn been overruled, and it is now held that such trusts are good under the statute, and the Supreme Court has also declared that they would have been good even apart from the statute. Further, in Delaware, Indiana, and Virginia, there are now *dicta*, though not yet decisions, in favor of spendthrift trusts.]

§ 240 *i.* [*Illinois.* — In *Steib v. Whitehead*, 111 Ill. 247, a testator devised land to a trustee in trust to pay the income in cash into the hands of J. in person, and not upon any written or verbal order, nor upon any assignment or transfer by J. The trustee was summoned as garnishee by reason of money which had come into his hands on account of the rents of the trust property, and which it was his duty to pay over to J. The Court recognized that the authorities were not in accord. "The question," they say, "so far as we are advised, is a new one in this Court, and, in view of the respectable authority to be found on either side of it, we feel at liberty to adopt that view which is nearest in accord with our convictions of right and a sound public policy." They decided that the attachment would not hold. "The tendency of present legislation," they add, "is to soften and ameliorate, as far as practicable, the hardships and privations that follow in the wake of poverty and financial disaster. The courts of the country, in the same liberal spirit, have almost uniformly given full effect to such legislation. The practical results of this tendency, we think,

upon the whole, have been beneficial, and we are not inclined to render a decision which may be regarded as a retrograde movement." See *Springer v. Savage*, 143 Ill. 301.]

§ 240 j. [*Maine*. — *Roberts v. Stevens*, 84 Me. 325. A testator gave the residue of his estate, after the payment of certain legacies, to his executor, to hold in trust during the lives of his three sons and of certain annuitants. Subject to the payment of the annuities, the income was to be divided among his living sons, and the families of such as might have deceased, until the expiration of the trust, and then to the testator's grandchildren equally. The testator added: "And I hereby enjoin it upon all legatees, annuitants, and other parties interested in the provisions of this will, not to make any arrangement or any agreement for a change in such provisions of the trust under this will, or to assign, or in any way, directly or indirectly, to transfer or make over any claim or rights they may have by virtue of this will, or to pay to any other person any legacy or annuity or any part thereof, than to such persons as are entitled to the same by virtue hereof, on the penalty of the forfeiture of the property or sum so assigned or paid, to go to that part of my estate which is applied to the benefit of those persons interested under the residuary clauses of this will, other than such as shall make said payment or assignment." From this blind clause the Court extracted an intention on the part of the testator that the trustees should not pay any part of the income to any creditor of a son, and consequently, upon a bill by a creditor of one of the sons to satisfy a judgment, the Court was called upon to consider whether such an intention on the part of the testator was lawful. They held that it was lawful, and dismissed the bill.]

§ 240 *k*. [*Maryland*.—*Warner v. Rice*, 66 Md. 436 A. conveyed his own property to a trustee in trust for the use and benefit of A. himself “and his immediate family, free from liability for any of his debts, contracts, or engagements, and when, if so by said trustee found requisite, by him deemed proper, to apply the uses, rents, income, and profits to the support and maintenance” of A. and his said family during A.’s life, and on his death as A. should by will appoint. The Court of Appeals held that A.’s interest could be reached by his creditors. As this was a case where the person having the equitable life interest was himself the settlor of the property, the creditors would have prevailed in any jurisdiction; see § 268 *a*, *post*; but the language of the Court gave reason to suppose that it would not join the new departure.]

§ 240 *l*. [In *Smith v. Towers*, 69 Md. 77, however, the Court of Appeals gave in its adhesion to the doctrine of the validity of spendthrift trusts in a case which presented that doctrine in the extremest form. A testator devised land to a trustee, in trust to pay the net income to A., “into his own hands, and not into another, whether claiming by his authority or otherwise,” during A.’s life, and on his death to convey the same in fee to A.’s children. The Court held that A.’s interest could not be reached by his creditors. Alvey, C. J., and Bryan, J., dissented. The opinion of the Court, and particularly the dissenting opinion of the Chief Justice, are by far the best discussions of the question to be found in the recent cases. See also *Maryland Grange Agency v. Lee*, 72 Md. 161.]

§ 240 *m*. [*Mississippi*.—In *Leigh v. Harrison*, 69 Miss. 923, a testatrix gave real and personal property to A. in trust for the life of B., with remainder to A., A. to use

the rents and interest for the support of B. during his life, making quarterly payments to him until his death. A bill in equity was brought by a judgment creditor of B. to reach his interest under the trust. The Court, in an elaborate opinion, dismiss the bill. They say, "Our statutes upon the subject of exemptions indicate a clear public policy that exemption from personal pauperism is of greater concern than the rights of creditors." See § 263, *post*. They add that, if there appeared to be an accumulation of income over and above the sum needed for the support of B., "such excess would seem to be liable to creditors, by reason of the fact that the whole income is given to him, and, as to such excess, the direction to the trustee to pay it to him quarterly would be absolute and unconditional." See *Tolland County Ins. Co. v. Underwood*, 50 Conn. 493, § 199 *b*, *ante*; *Nickell v. Handly*, 10 Grat. 336, § 245, *post*.]

§ 240 *n*. *Vermont*. — *White v. White*, 30 Vt. 338. A sum of money was bequeathed outright to A. "for the support of himself and family, and for no other purpose." The executors paid the money to A.'s attorney. The plaintiffs sued A., and summoned the attorney as garnishee, or, as he is commonly called in New England, "trustee." The Court held that A. took the money in trust for himself and his family, and that the attorney could not be held as garnishee. The interest, that is, of A. in the money in the hands of the attorney was either an interest as trustee for himself and his family, or an interest as one of the *cestuis que trust* under that trust. So far as it was an interest of A. as trustee, it was not subject to garnishment by a private creditor of A.'s; so far as it was an interest of A. as *cestui que trust*, being equitable, it could not be reached by

garnishment. *Hoyt v. Swift*, 13 Vt. 129. *Weller v. Weller*, 18 Vt. 55. See *Roberts v. Hull*, 35 Vt. 28; *Whitcomb v. Cardell*, 45 Vt. 24. On this question, whether the interest of a trustee who is also one of the *cestuis que trust* can be taken on execution or attached, see the conflicting decisions, §§ 172, 173, *ante*. Its determination does not touch the question of remedy in equity. The only thing in the case possibly bearing on the matter now in hand is a *dictum* of Bennett, J. At the end of his opinion he says (p. 344): "For one I should apprehend, if a legacy is given to a son for his support, and for no other purpose, a trust would be created, and that the property would be held subject to the trust." This must mean that such a legacy could not be got at by garnishment, which is merely a question of local practice. To suppose that the learned judge meant that a legacy (not merely the income for life, but the absolute interest) given to A. for his own support could not be reached in equity by A.'s creditors, is a gratuitous and most improbable assumption, which goes far beyond anything to be found either in England or America. See §§ 105-124, *ante*. There is, therefore, no reason to suppose that the rules of equity would be departed from in Vermont.

§ 240 o. [This was written in 1883, but four years later, in *Barnes v. Dow*, 59 Vt. 530, the Supreme Court of Vermont took up with the new doctrine, basing itself mainly on Mr. Perry's Treatise on Trusts. A testator's will read in this wise: "I give, devise, and dispose to my nephew, Lewis A. Dow, and his heirs, all of my effects or estate, both real and personal, except the support of my sister, Hannah Barnes, during her lifetime. And I give my estate in trust of my executor. I give to Hannah Barnes, my

sister, her support during her natural lifetime out of my estate." The Court held that the executor took the legal fee of the land devised; that the sister had an equitable life interest; and that this interest she could not alienate.]

§ 240 *p.* *Missouri*.—*McIlvaine v. Smith*, 42 Mo. 45; *Lackland v. Smith*, 5 Mo. App. 153. A. caused land to be conveyed to B. in trust to pay the net rents quarterly to A. for life, such payments to be made only to A. in person or order, without any power of anticipation; and if A. should attempt to anticipate any quarter's income, such quarter's income should be accumulated for those in the remainder; with remainders over. It was held that, although A.'s interest could not be taken on execution, it might be reached by creditor's bill. In this case the *cestui que trust* was the real settlor, but the Court approve the general doctrine as laid down in *Brandon v. Robinson*.

§ 240 *q.* [In *Pickens v. Dorris*, 20 Mo. Ap. 1, the St. Louis Court of Appeals held that an equitable life estate could be reached by a creditor of the *cestui que trust*, if there was no clause against alienation, but the Court expressed its opinion that such a clause would be valid; and in *Lampert v. Haydel*, 20 Mo. Ap. 616, the same Court made a decision to that effect. In that case land was devised to trustees for the use and benefit of the testator's three sons during their lives. The testator added that his object was "to secure to my children a certain annual income beyond the accident of fortune and bad management on their part, and with this end in view to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts." One of the sons assigned all his interest in the trust. It was held that the trustee was justified

in refusing to recognize the validity of the assignment. The case was carried to the Supreme Court of the State, and judgment was there affirmed. 96 Mo. 439. See *Jarboe v. Hey*, 122 Mo. 341, 351.]

§ 240 r. [In *Partridge v. Cavender*, 96 Mo. 452, a testator gave property to trustees in trust for the use and benefit of his son, and directed them to pay the income every half-year to the son on his personal receipt without his having "any power to sell, assign, or pledge the same, previous to the payment thereof to him as aforesaid, by way of anticipation." The Supreme Court held that the income could not be reached by a judgment creditor of the son. See *Montague v. Crane*, 12 Mo. Ap. 582.]

§ 240 s. [*Bank of Commerce v. Chambers*, 96 Mo. 459. A bill in equity alleged that a woman gave the residue of her estate, real and personal, to a trustee in trust during the life of the husband of the testatrix to pay quarterly the net income into the proper hands of the husband or such person as he might in writing appoint, and on his death to convey and pay over the trust property to those persons who should then be the heirs of the testatrix; that the testatrix declared that her sole object in creating the trust was that she might, of her own estate, secure to her husband an ample independence for his life "free from the claims and demands of any creditor he may now or hereafter have, and without any right to intervene, or sequester of the revenues of the trust for the payment of their claims or demands;" that she also declared that the provisions made for her husband were upon condition that, within six months after probate of her will, her husband should release any right he might have as tenant by the curtesy; that the husband released his right as tenant by the curtesy;

and that the plaintiff was a judgment creditor of the husband. On demurrer the Court held that the interest given to the husband by his wife's will was not a mere bounty, but had been purchased by a release of his tenancy by the curtesy, and that the plaintiff was entitled to have his judgment satisfied out of the income of the trust fund. See § 268 *a, post*. Cf. *Jarboe v. Hey*, 122 Mo. 341, 351.]

§ 240 *t. Tennessee*. — In the Code of 1858, §§ 4282-4284, it is provided that a judgment creditor may file a bill in equity to subject to the satisfaction of the judgment property held in trust for the debtor which cannot be reached by execution, "except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded, or deed duly registered." This was at first interpreted as meaning that, if the trust property had proceeded from some person other than the defendant himself, and the trust was declared by will duly recorded, or deed duly registered, it could not be reached by bill in equity. *Johnson v. Hurley*, 3 Tenn. Ch. 258. *Staub v. Williams*, 5 Lea, 458. And see *Nichols v. Levy*, 5 Wallace, 433.

§ 240 *u*. But in *Turley v. Massengill*, 7 Lea, 353, a testator devised all his property to his son, and, by codicil, directed that it should be vested in a trustee for the use and benefit of the son, and that no part of it should be liable for any debt of the son, but that the son might use the rents and profits for his support and that of the testator's wife, and should have the right to dispose of it by will. The testator's widow died. It was held that a judgment creditor of the son could maintain a bill in equity to have the property applied to his debt. The son's interest

seems to have been considered an absolute legal estate in fee, and not an equitable life estate, but the Court quote with approval the remark of Swayne, J., in *Nichols v. Levy*, 5 Wall. 433, 441, that "it is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors."

§ 240 v. A later decision of the Supreme Court of Tennessee [was supposed to have] settled the law for that State. In *Hooberry v. Harding*, 3 Tenn. Ch. 677, s. c. on appeal, 10 Lea, 392, Rachel Stump devised and bequeathed property, real and personal, to trustees in trust to suffer and permit her son, Philip S. Stump, during his life to have and receive from the income of the property, for his support and maintenance, such sums and amounts as he might deem proper, "in such manner, however, as that the same shall not be liable to his debts, or for contracts made by him;" and in trust to suffer and permit said son "to have and to exercise such control over the slaves and real estate hereby bequeathed and devised, in the cultivation and renting of the one or hiring or working the others, for one year at a time, as he, said Philip S., may deem proper; in such manner, however, only that said Philip S. may derive a support therefrom, and that the same shall not be liable for his debts or contracts; it being my intention to provide for said Philip S., out of the issues of said property, a sum sufficient for his support; of the amount of which sum said Philip S. is to be judge." There was a gift over on the son's death to his children. The testatrix added: "I hereby declare it to be my intention, by the be-

quest and devise to trustees above, to provide a support for my son Philip S. out of my estate, and not to vest in him any interest in said property which may or can be subjected to debts or contracts made or entered into by him." A creditor of the son recovered judgment against him, and levied execution on his interest in the land and on the produce of the land. The son and his children filed a bill to enjoin any sale on the execution, and thereupon the creditor filed a cross-bill in which he sought to subject the profits of the land and the son's interest in it to the satisfaction of his judgment. Chancellor Cooper held that the trust was an active one; that therefore the son had only an equitable interest, which could not be taken on execution; and that the sections of the Code above cited (§ 240 *t*, *ante*) prevented the creditor from having any remedy in equity. The case was carried by appeal to the Supreme Court. There the decision of the Chancellor that the trust was an active one, and that therefore the son had only an equitable interest which could not be taken on execution at law, was affirmed; but his ruling on the other point was reversed, and it was held that, notwithstanding the language of the Code, the life estate of the son was subject in equity to the satisfaction of the judgment against him. There never seems to have been any doubt in Tennessee that, apart from statute, restraints upon the alienation of equitable life interests were invalid; and this last decision held that the language of the Code, strong as it was, did not make them good.

§ 240 *w*. [But there is now a complete overturn in Tennessee. The Supreme Court has not only held that the Code protects spendthrift trusts from creditors, but it has said that such trusts are good even apart from statute. In

Jourolmon v. Massengill, 86 Tenn. 81, the same will as was involved in *Turley v. Massengill*, *ubi supra*, came again before the Court. The question was whether the son's interest could be taken on execution at law. It was held that the interest was an equitable interest, and therefore not subject to levy. Whether the Court thought the equitable interest was for life only or in fee is not clear. This is all that was decided. But Lurton, J., in giving the opinion of the Court, goes into the whole matter, and says that under the provisions of the Code the son's interest could not be reached by creditors, and that even apart from statute the same would be the case. He says that the decisions in *Turley v. Massengill* and *Hooberry v. Harding* "have excited such surprise and disapproval with the profession that we are called upon in this case to reconsider the ground upon which they rest." (p. 102.) The learned judge supports what "may well be termed the American rule" as to the validity of spendthrift trusts by the analogy of "our exemption laws." "Under such laws large masses of property are, in pursuance of a public policy, finding expression in legislation, exempt from liability for debts," (p. 104,) and concludes that *Turley v. Massengill* and *Hooberry v. Harding* must be considered as overruled.]

§ 240 *x*. [*Henson v. Wright*, 88 Tenn. 501. Land was conveyed to A. in trust, to hold to the only proper use and benefit of B., for B.'s benefit only, and to account to him for the rents during his life, and on B.'s death to convey it over. It was held that A. and B. could together convey a good estate in the land for B.'s life. *Porter v. Lee*, 88 Tenn. 782. Land was devised to a trustee in trust to lease, collect the rents, pay expenses, and pay over the net rents to the testator's children, on the death of either child its

children to take its share of the rents. This certainly was not a spendthrift trust, but it was held that the provisions of the Code, *ubi supra*, prevented the equitable life estate of a child being reached by a bill in equity brought by a judgment creditor. In Tennessee, therefore, it has been held that a creditor is prevented by statute from reaching *any* equitable interest (not created by the *cestui que trust*) whether of a spendthrift character or not. That the *cestui que trust* cannot voluntarily alienate his interest, whether it be for life or in fee, has never yet been decided in Tennessee. See *Potter v. Couch*, 141 U. S. 296, § 124 *r, ante.*]

§ 240 *y.* [*Delaware.*—In *Gray v. Corbit*, 4 Del. Ch. 135, land was devised on trust that the trustees should “pay, apply, and dispose” of the rents, “as the same shall from time to time be received, to the comfortable and respectable maintenance and support of my son Richard Thomas, during his natural life, at such place and in such manner” as the said trustees might in their discretion think proper, and on his death to convey the same to his children. Richard was an imbecile. At his death part of the rents were in the hands of the trustees unexpended; the Court held that they did not belong to Richard’s administrator. In the course of the opinion, the Court, speaking of cases on rights passing to an assignee in bankruptcy, say: “The principle of those cases is this: that a trust for the general benefit of a person who is *sui juris*, a trust which is not in terms limited to the purpose of mere maintenance, and which therefore may be so used as to afford the substantial advantage of ownership and at the same time be a cover against liability for debts, shall be held to vest an interest assignable under the bankrupt

law. The express exclusion of creditors found in some of this class of cases only renders them more directly obnoxious to the policy of the law : nor does the latitude of discretion sometimes given to trustees to withhold the fund save such a case ; for the material question, under the statute, is not whether the trustees *may* use the fund only for maintenance, but whether they are at liberty to go beyond maintenance. If the latter, then, as the trust *may* be used as a cover against creditors, it is within the policy which treats these trusts as vesting an interest assignable in bankruptcy. The only mode of saving from the effect of bankruptcy a trust for the general benefit of the party, is by limiting it to continue only until bankruptcy or insolvency and to determine absolutely in such an event. . . . The result of these decisions is that a trust for the general benefit of a person *sui juris* which, not being restricted to maintenance only, may be so used as to confer the substantial advantages of ownership, shall be deemed to vest a transmissible interest so as to protect the policy of the bankrupt laws. But that policy has not been extended by any decision, even under the bankrupt laws, to a provision restricted to the maintenance and support of an imbecile person, incapable of managing his affairs to such an extent as to contract liabilities which ought to be protected." Delaware has, by reason of these remarks of its Supreme Court, been here included among those States where the *dicta*, if not the decisions, favor spendthrift trusts, but it is obvious that such trusts are approved by that Court only when of a very peculiar character. When a trustee can spend the income of a trust fund for the support and maintenance of A., and cannot give A. anything more than is needed for his support, then the

Delaware Court would not allow the amount needed for the support of A. to be reached by A.'s creditors; but the theory on which *Broadway Bank v. Adams*, 133 Mass. 170, goes, that you can save an equitable life interest from creditors by simply saying that they cannot touch it, would be unequivocally condemned in Delaware.]

§ 240 *z*. [*Indiana*. — In *Martin v. Davis*, 32 Ind. 38, the validity of spendthrift trusts was a question raised, but not decided. In *Thompson v. Murphy*, 37 N. E. Rep. 1094, in the Appellate Court, (which, in spite of its name, is a subordinate court in Indiana,) it was held that a legal life estate could not be devised to be free from the grantee's debts, but the Court say that they think the testatrix by a trust could have provided "the means for the subsistence of her son, without exposing it to his improvidence, and free from levy and sale by his creditors."]

§ 241. In *Virginia*, the question of the inalienability of a *cestui que trust's* interest in property out of the income of which he is to be supported for life [did not come up for consideration until 1891]. The only point discussed had been whether the interests of several *cestuis que trust* could be severed, or whether they were so conjoined that no part of the trust fund could be reached for the debts of any one of them. See § 176, *ante*. The cases are as follows.

§ 241 *a*. *Scott v. Gibbon*, 5 Munf. 86. *Scott v. Loraine*, 6 Munf. 117. *Roanes v. Archer*, 4 Leigh, 550. Property conveyed by a man to the trustees of his marriage settlement cannot be taken on execution against him. See *Butler v. McCann*, 4 Leigh, 631.

§ 242. *Markham v. Guerrant*, 4 Leigh, 279. A. conveyed property to trustees in trust to pay A.'s debts, and

for the support and maintenance of A., and B. his wife, and their children and family, during the joint lives of A. and B. and the life of B., and at her death over; with authority to sell the principal, at the trustees' discretion, to pay the debts of A. due at the making of the deed. A. after making the deed contracted a debt to C., and died. Held that C. was not entitled, as against the widow and children, to any part of the income accruing after A.'s death.

§ 243. *Doswell v. Anderson*, 1 Pat. & H. 185. A woman conveyed property to trustees for the sole and separate use of herself during her life, "the profits to be applied to her sole and separate use, and the support, maintenance, and education" of her children, and on her death to her children. After this conveyance she contracted debts. The creditors filed a bill for the payment of these debts out of the principal. The Circuit Court ordered the principal sold to pay these debts. But the Special Court of Appeal reversed the decree.

§ 244. *Perkins v. Dickinson*, 3 Grat. 335. A woman made a deed giving her property, on her marriage, to trustees, upon trust that her husband should, during the joint lives of himself and her, enjoy the profits, but that they should not be liable for his debts. It was held that it was intended that the husband and wife should enjoy the profits jointly, and that he had no separate share which could be got at by his creditors. To derive this intent from the facts in the case may be a strained construction, but it is on this supposed intent that the decree went.

§ 245. *Nickell v. Handly*, 10 Grat. 336. Devise to trustees in trust to use the property so as to be most advantageous to the interests and support of H. and her

children during the life of H., and on her death to her children. Held (Moncre, J., dissenting) that H. had no separate interest which could be reached for her debts. But it was said that, if there was a surplus after providing a reasonable support for the family, H. and her children would share it equally, and H.'s share would be liable for her debts (p. 342). [Cf. *Tolland County Ins. Co. v. Underwood*, 50 Conn. 493, § 199, *b, ante*; *Leigh v. Harrison*, 69 Miss. 923, § 240 *m.*]

§ 246. *Johnston v. Zane*, 11 Grat. 552. Z. conveyed property to trustees to pay his debts, to buy a house for Z. and his wife, to be occupied by them and the survivor, and to invest the rest of the property and apply the proceeds to the support of Z. and his wife and the survivor. Remainder over on the death of the survivor. Z.'s debts were paid, a house was bought, and Z. died. Held that debts of Z. contracted after the conveyance were not to be satisfied out of the income, as against the widow and children. It is said (pp. 569, 570) that, had Z. been alive, he had no interest which could be reached by his creditors; and though this is *obiter dictum*, yet it agrees with the two preceding cases, which establish (in accordance with some other authorities, see § 176, *ante*) that, when property is given to trustees for several persons, who are to enjoy it together, or at the discretion of the trustees, no one of the *cestuis que trust* has an interest which can be attached.

§ 247. *Nixon v. Rose*, 12 Grat. 425, merely establishes that a married woman may be restrained from anticipation.

§ 248. *Armstrong v. Pitts*, 13 Grat. 235. Devise of land and slaves to trustees, for the use and benefit of A.

for life, he to have the privilege of living on the land, and having the use of the slaves, so far as might be necessary for his support and maintenance, and the support and maintenance of his family; at his death, over. The property not to be liable for any debt of A. Held that a creditor of A. could not proceed against this trust fund without getting judgment. See § 170, *ante*. Whether judgment creditors could have any remedy is expressly left undecided (p. 243).

§ 249. The question, therefore, how far a creditor can reach property which has been placed in trust for his debtor, with a declaration that it shall not be liable for his debts, had not, [when the first edition was published,] been answered by any decision of the Virginia courts. See *Coutts v. Walker*, 2 Leigh, 268. *Cochran v. Paris*, 11 Grat. 348. *Lewis v. Henry*, 28 Grat. 192.

§ 249 *a*. [*Camp v. Cleary*, 76 Va. 140. Here it was held that a clause of forfeiture upon an attempt to alien a life estate was good. The Court declined to consider the question whether a restraint upon alienation could be annexed to a life estate.]

§ 249 *b*. [In *Garland v. Garland*, 87 Va. 758, a testator set apart real and personal property in trust in the hands of his executor, for the benefit of his brother. "The profits of the estate is [*sic*] set apart for his use under his superintendence, but neither the estate or profits shall be bound for his past debts, or for future debts or liabilities other than decent and comfortable support." At his death all the property in this clause is to pass to C. At the death of the brother there were profits of the trust property in the hands of the trustee. The Court held that these did not pass to the brother's administrator.

The Court refers to *Nichols v. Eaton*, 91 U. S. 716, §§ 251 *et seqq.*, *post*, and *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*, and says, "the reasoning of these cases commends itself to our judgment, and fully establishes the validity of this trust" (p. 763); but as the Court say shortly before, this seems to be beside the mark. All that *Garland v. Garland* decides, be it rightly or wrongly, is that the testator's brother had no right to any more of the profits than was needed for his decent and comfortable support, while *Broadway Bank v. Adams* decides, and Miller, J., in *Nichols v. Eaton* says, that the profits to which a *cestui que trust* has a right cannot be alienated by him or taken by his creditors. The validity or invalidity of spendthrift trusts, therefore, notwithstanding the many cases which have grazed the subject, has never been authoritatively decided in Virginia.]

§ 250. *Federal Courts.* — It is now necessary to consider how the question has been treated in the courts of the United States. — *Nichols v. Levy*, 5 Wallace, 433. Land in Tennessee was conveyed to a trustee to allow the *cestuis que trust* to use the property, but so that it should not be liable for their debts. A judgment creditor of the *cestuis que trust* brought a bill in equity to reach their interest. The Court held that the statutes of Tennessee prevented this being done. [See §§ 240 *t* – 240 *x*, *ante*.] But they said: "If the determination of this case depended upon the general principles of jurisprudence, the result must necessarily be in favor of the appellees. It is a settled rule of law, that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent

characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." (p. 441.)

§ 250 *a.* In *Sanford v. Lackland*, 2 Dill. 6, 10, Dillon, J., says that a testator "cannot give the beneficial interest, and annex to it the inconsistent condition that it shall not be liable for the debts of the devisee."

§ 251. *Nichols v. Eaton*, 3 Cliff. 595, s. c. 91 U. S. 716. Property was devised to trustees, in trust to pay the income to the children of the testatrix in equal shares, on the death of each child its share to go over. If her sons respectively should alienate or dispose of the income, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income was to be paid to the wife and children, or wife or child, as the case might be, of such son, and, in default of wife or children, then to be added to the principal; and further, "in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my

said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." One of the sons became bankrupt, and his assignee in bankruptcy brought a bill against the trustees to have the income of the son's share applied for the benefit of the creditors. The case was fully argued.¹

§ 252. The opinion of the Court was delivered by Mr. Justice Miller. He begins by saying that "the claim of the assignee is founded on the proposition that a will which expresses a purpose to vest in a devisee either personal property or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void, on grounds of public policy, as being in fraud of the rights of creditors; or, as expressed by Lord Eldon in *Brandon v. Robinson*, 18 Ves. 433, 'If property is given to a man for his life, the donor cannot take away the incidents of a life estate.' There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?"

§ 253. The learned judge devotes himself to the consideration of the first proposition, and, after discussing the cases, he sums up by saying (p. 724) that the English decisions "are all founded on the proposition, that there is somewhere in the instrument which creates the trust a sub-

¹ [See § 265 *a*, note, *post.*]

stantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt."

§ 254. A clearer statement of the test to be applied in these cases is not to be found in the books, and, as the learned judge says, it was conclusive against any rights of the bankrupt's assignee in the case before the court. But, notwithstanding, the learned judge goes on to consider what the decision would have been had the facts been other than they were; viz. if the bankrupt *cestui que trust* had had the sole equitable right in the property. To the question raised by this hypothetical state of facts the greater part of the opinion is directed; and of it the learned judge says (p. 729): "We have indicated our views in this matter rather to forestall the inference that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel,¹ than because we have felt it necessary to decide it." The expression of opinion, then, in *Nichols v. Eaton*, by Mr. Justice Miller, which is the chief reliance of the supporters of spendthrift trusts, was distinctly recognized by the learned judge himself as entirely unnecessary to the decision of the case. [He said also: "Nor has the time which the pressure of business in this Court authorizes us to devote to this case permitted any

¹ The report of the arguments shows that this statement is quite correct. The eminent counsel on both sides evidently considered the law as laid down in *Brandon v. Robinson* to be unquestionable.

further examination into the decisions of the State courts ;” in other words, it was not only a *dictum*, but confessedly an ill-considered *dictum*.] It was in flat contradiction to the law of the State in which the will was made, and where all the parties to the suit lived, (*Tillinghast v. Bradford*, 5 R. I. 205, § 179, *ante*,) as well as to that of England and of the great majority of those States in which the question had arisen ; and it was given on a point not discussed by counsel, and not discussed because the counsel in whose favor the proposition maintained by the learned judge went thought it too untenable for serious argument. The manner, therefore, in which this startling novelty was produced does not increase the weight to be given it.¹

¹ That a judge should not occasionally let fall a remark not strictly necessary to the decision of a case is neither possible nor desirable ; but of elaborate statements, confessedly uncalled for to determine a cause, and confessedly made to forestall opinion on a matter not in judgment, there have been, it is believed, before *Nichols v. Eaton*, and since *Marbury v. Madison*, 1 Cranch, 137 (1803), but two cases in the history of the Supreme Court. They are worth noting.

From 1842 to 1844 a controversy had been going on between the Superior Court of New Hampshire and Judge Story, sitting as Circuit Judge in the First Circuit. The latter claimed, and the former denied, the right of the courts of bankruptcy to enjoin proceedings in the State courts, and to direct the sheriff to deliver property attached in a State court to assignees in bankruptcy. *Ex parte Foster*, 2 Story, 131. *In re Cook*, Id. 376. *Kittredge v. Warren*, 14 N. H. 509. *In re Bellows*, 3 Story, 428. *Everett v. Stone*, Id. 446. *Kittredge v. Emerson*, 15 N. H. 227. In 1844 the Supreme Court of the United States was moved to issue a writ of prohibition to a District Court sitting in bankruptcy. The Court was unanimous against the right to issue the writ ; but Judge Story, who delivered the opinion, embraced the opportunity to reaffirm the opinions on the power of the bankruptcy courts which he had maintained on circuit. *Ex parte Christy*, 3 How. 292. Mr. Justice Catron protested. That the Supreme Court, he said, has no jurisdiction “ to revise the proceedings of a bankrupt court, is our unanimous opinion. So far we adjudge ; and in this I concur. But a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the bankrupt court. In this course I

§ 255. The *dicta* in *Nichols v. Eaton* are, however, unquestionably the most forcible presentation of the doctrine of spendthrift trusts, — more so than any that can be found in their native home of Pennsylvania; and this seems, therefore, the best place to examine the arguments urged in its support.

§ 256. The learned judge says (p. 725): “We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin.”

cannot concur; perhaps it is the result of timidity, growing out of long-established judicial habits in courts of error elsewhere, never to hazard an opinion where no case was before the Court, and when that opinion might be justly arraigned as extrajudicial and a mere *dictum* by courts and lawyers; be partly disregarded while I was living, and almost certainly be denounced as undue assumption when I was no more. A measure of disregard awarded with an unsparing hand, here and elsewhere, to the *dicta* of State judges under similar circumstances; and it is due to the occasion and to myself to say, that I have no doubt the *dicta* of this Court will only be treated with becoming respect before the Court itself, so long as some of the judges who concurred in them are present on the bench, and afterwards be openly rejected as no authority — as they are not.” (p. 322.) The words were prophetic. The next year Judge Story died. The Superior Court of New Hampshire entirely disregarded his *dicta* in *Ex parte Christy. Peck v. Jenness*, 16 N. H. 516. The case was carried to the Supreme Court of the United States, and there, in 1849, the decision of the State Court was unanimously confirmed. *Peck v. Jenness*, 7 How. 612.

The other instance in which the judges of the Supreme Court in delivering opinions have indulged in elaborate *dicta*, confessedly uncalled for, is *The Dred Scott Case*, 19 How. 393.

The result of the cases does not augur well for the practice.

If this means that, at some earlier period, trusts of this kind were treated differently from what they are at present, the statement is without any evidence for its support. The doctrine is modern only because such trusts are themselves modern. As soon as such trusts appeared, equity hastened to give a remedy; and the remedy was simply to apply the venerable principle of law and equity alike, — that property shall be alienable and liable for debts. See §§ 143–149, *ante*. Instead of the English Chancery ingrafting new doctrines on the common law in this matter, it followed the common law closely and rigorously. The common law held that legal estates of freehold, whether in fee simple or for life, should not be inalienable; and Chancery held the same of equitable estates of freehold. The common law held that a legal life estate might be made determinable on alienation; and Chancery held the same of an equitable life estate. And, if Chancery held that a married woman's separate estate might be made inalienable by her, it only followed in this what had always been the doctrine of the common law. [The common law took from a married woman the power to alienate her property and to charge it with debts; and so did equity. The common law took it from her for the benefit of her husband, equity took it from her for her own benefit. But in both systems the conception of a married woman as a person not to have the control of property was a familiar one. See § 269, *post*.] The idea which seems to pervade this opinion, as well as *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*, that the English Chancery departed from the true rules of common law jurisprudence, to which these cases have recurred, is a singular reversal of the facts. The English Chancery walked scrupulously

in the ancient ways of the law ; and it is these late cases which have departed from the principles of the common law, as much as they have from the precedents in equity.

§ 257. The Supreme Court of Massachusetts, in *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*, distinguishes legal estates from equitable, on the ground that a condition not to alien is “repugnant” to a legal estate. But a condition not to alien is just as “repugnant” to an equitable estate. What is meant by repugnancy? Not logical inconsistency. The conception of a condition against alienation attached to a legal fee simple or life estate presents no logical difficulties. If the legislature should declare such conditions valid, the courts would have no trouble in upholding them. This supposed repugnancy or incongruity is either “a notion which savors of metaphysical refinement rather than of anything substantial,” (*per* Lord Truro, C., in *Watkins v. Williams*, 3 Macn. & G. 622, 629, § 58, *ante*,) or it means “against public policy.” [See also §§ 74 *b*–74 *f*, *ante*.] A restraint on the alienation of an equitable estate is as much against public policy as is a restraint on the alienation of a legal estate. Certainly no one has ever shown a distinction. And again, if equitable estates are to be distinguished from legal estates, why confine the difference to equitable life estates? Yet the idea that an equitable fee simple can be enjoyed free from liability for debts is indignantly scouted even in Pennsylvania. *Keyser’s Appeal*, 57 Pa. 236, § 115, *ante*.¹ And see §§ 105 *et seqq.*, *ante*. In short, the doctrine that an equitable life estate may be created inalienable and free from liability for debts, if it be law, is

¹ [In the light of recent decisions, this is too strongly put. §§ 124 *a*–124 *k*, *ante*.]

an anomaly without support from analogy, either at common law or in equity.

§ 258. And this leads to the consideration of a fallacy which, it is conceived, has justified to the courts in these late cases, if it has not produced, the notion that equitable life interests may be made inalienable, and not to be reached by creditors. That fallacy is, that the only objection to such inalienable life estates is that they defraud the creditors of the life tenant; and the courts labor, with more or less success, to show that these creditors are not defrauded.¹ Thus Miller, J., in this case of *Nichols v. Eaton* (p. 725), says, "If the doctrine [of non-inalienability of equitable life interests] is to be sustained at all, it must rest exclusively on the rights of creditors." So, in *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*, the Court say, "The only ground upon which it [the clause against alienation] can be held to be against public policy is that it defrauds the creditors of the beneficiary." But, with submission, this is not the ground why equitable life estates cannot be made inalienable and free from debts. The true ground is that on which the whole law of property, legal and equitable, is based; — that inalienable rights of property are opposed to the fundamental principles of the common law; that it is against public policy that a man "should have an estate to live on, but not an estate

¹ In *Nichols v. Eaton*, 91 U. S. 716, 726, and *Broadway Bank v. Adams*, 133 Mass. 170, it is said that by means of the public records creditors can learn the existence of these trusts. But (1.) Deeds settling personal property, e. g., marriage settlements, are not recorded. (2.) In what registry is a creditor to look to see whether there is a will creating a spendthrift trust in favor of his debtor? That a debtor lives in a certain county is no reason why a trust may not be created for him by a will recorded in some other county or State.

to pay his debts with," *Tillinghast v. Bradford*, 5 R. I. 205, 212, § 179, *ante*, and should have the benefits of wealth without the responsibilities. The common law has recognized certain classes of persons who may be kept in pupillage, viz. infants, lunatics, married women; but it has held that sane grown men must look out for themselves, — that it is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly. It is wholesome doctrine, fit to produce a manly race, based on sound morality and wise philosophy.

§ 259. The argument, therefore, that the property devised or settled belonged to the testator or settlor, and that he could do as he would with his own, is entirely beside the point. He could not devise or settle it for an unlawful purpose, such as a gift for a public or private nuisance, or a gift in violation of the Rule against Perpetuities. A. cannot devise a legal life estate with a provision that it shall not be subject to the devisee's debts. Why not? *Cujus est dare, ejus est disponere*. The debts are not the debts of the testator. A. cannot devise an equitable fee simple with a provision that it shall not be subject to the devisee's debts. Why not? *Cujus est dare, ejus est disponere*. The debts are not the debts of the testator. Yet it is not disputed that these devises are bad; but they are bad for no other reason than that for which a devise of an equitable life estate with a provision that it shall not be subject to the devisee's debts is bad, namely, that such a provision is against public policy and illegal, just as an executory devise to take effect fifty years hence is against public policy and illegal. A testator may give such rights of property as he pleases, provided they are rights which the law sanc-

tions ; but inalienable rights of property the law has never sanctioned, for they are inconsistent with that ready transfer of property which is essential to the well-being of a civilized community, and especially of a commercial republic.¹

§ 260. There is one argument in favor of spendthrift trusts, which, though but little relied on in the cases, seems to have more substance than any other. It must be conceded that, if a trustee has a discretion to pay the income of the trust fund to one or more of several persons at his option, exclusive of the others, the income cannot be reached by the creditors of any one of the *cestuis que trust* ; for no one of them has any rights. The trustee may choose to give all the income to another of the number ; and one man's property cannot be taken for another man's debts. In this way, it may be said, the rule that a man's interest shall be liable for his debts can be, and in practice often is, evaded by giving property to trustees, in trust to pay the income to A., or to any member of his family, at the trustee's option, or to accumulate it for the remainderman, the testator intending that the trustee should give, and the trustee in fact giving, the whole income to A., and yet no creditor of A. being able to reach it ; and it may be urged that a rule of law which can be so readily evaded is not worth preserving, and in fact that it is derogatory to the courts to announce a rule of law, and yet at the same time

¹ "It contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. . . . Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed [*qu. dead*] of a former period, or that the non-payment of debts should be encouraged." *Overman's Appeal*, 88 Pa. St. 276, 281, § 234, *ante*.

declare themselves unable to prevent its obvious and easy evasion.

§ 261. But, in the first place, the evasion is not so easy. Many a testator will hesitate about giving trustees an uncontrolled power to give the income entirely away from the only person he desires to benefit; and, if the trustees cannot give the income entirely away from such person, then such person has rights, and his rights his creditors can reach. But, again, there are many cases where an insolvent man enjoys the benefit of wealth which is not liable for his debts, and there is not felt to be any scandal upon public justice. A rich father supports an insolvent son, and no one supposes that a creditor of the son has any legal claim against the father. One may think that the father would make a better use of money by paying the debts of the son, than by supporting him in idleness; but no one has ever suggested that the law should interfere. Yet, if the money used for the support of the son was paid to him, his creditors could take it. Why is it felt to be no discredit upon courts of justice that they are foiled by this distinction? Simply because the son has no rights in the matter. The court may feel perfectly sure that the father will use the property for the benefit of the son; but such use is voluntary. And if the son has no legal demand on the father, the creditors of the son, who claim under him, can have no demand either. Now it is possible for the father to continue this state of things by substituting some one in his place, by deed or will, who may continue this same voluntary action; he may appoint a trustee with discretion whether to support the son or not, and the son's creditors are in the same position that they were in during the father's lifetime. But if the trustee has not this dis-

erection, then the son has rights, and therefore his creditors have rights. If a man resolves to keep a child after his death dependent for support on the absolute discretion of an individual, he can do it; he is not bound to give the child any rights, and law and morals are not concerned in the question. But it is submitted that law and morals are concerned in upholding the doctrine that a man's rights of property should be used to pay his debts. To say whether a man has rights is often difficult, but there is and ought to be no difficulty in saying that his rights, whatever they are, are alienable, and can be reached by his creditors. See § 167, *ante*.

§ 261 *a*. [But the true answer to this argument is indicated in the late cases of *Re Coleman*, 39 Ch. Div. 443, and *Re Neil*, 62 L. T. N. S. 649, §§ 167 *b*–167 *e*, *ante*. When a trustee has a discretion to apply the income of the trust fund to the support of A. or to other purposes, the assignees of A. cannot compel the trustee to pay them anything, for he may use the whole income in other ways; but whatever the trustee actually expends for A.'s benefit, for that amount he is accountable to the assignees. This is a perfect protection against evasion.]

§ 262. The most singular thing in the opinion in *Nichols v. Eaton* is the theory that these "spendthrift trusts" are something American (p. 725), and that the subjection of equitable life interests to creditors is English and un-American. Unless the payment of debts be considered un-American, it is hard to see the Americanism of spendthrift trusts. That grown men should be kept all their lives in pupilage, that men not paying their debts should live in luxury on inherited wealth, are doctrines as undemocratic as can well be conceived. They are suited to the

times in which the Statute De Donis was enacted, and the law was administered in the interest of rich and powerful families. The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practise every fraud, and yet, provided they kept on the safe side of the criminal law, could roll in wealth. They would be an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed.

§ 263. The American character of these trusts is deduced by the learned judge in *Nichols v. Eaton* from the analogy of the statutes exempting property from execution which prevail in most of the States. [And see §§ 240 *i*, 240 *m*, 240 *w*, *ante*.] But the analogy is fallacious. The object of the exemption laws is to save poor men from being pushed to the wall. They are to be supported on the theory that a man is more likely to be a useful member of society, and to pay his debts, if he is not deprived of his tools, or of a bare subsistence.¹ The object of spendthrift trusts is to enable the children of rich men to live in debt and in luxury at the same time. The *cestui que trust* of a spendthrift trust is not likely to become a valuable citizen.

¹ [It must be admitted, however, that in some of the United States laws exempting property from execution have been carried to an extent which it would not be easy to justify on any sound principles of ethics or political economy. Thus in Nevada (Gen. Sts. 1885, § 539) a homestead to the value of \$5,000 is exempt. In Texas (Const. of 1876, Art. 16, § 51), a homestead of the value of \$5,000 when first selected without regard to subsequent improvements. In Arkansas (Dig. of Sts. (1874), §§ 2623, 2625) a homestead to the value of \$5,000, and personal property to the value of \$2,000. In Kansas 160 acres in the country or an acre in a town, as a homestead, without limit as to value (Const. of 1859, Art. 15, § 9), and a long list of personal property (Gen. Sts. of 1889, § 2998), when belonging to a head of a family, including the musical instruments used by the family, all the clothes of the family, beds, bedding, stoves, implements of indus-

§ 263 *a*. None have more reason to regard this new doctrine with dislike than those persons who have accumulated or inherited property. There is much and growing jealousy of wealth. The general introduction of these spendthrift trusts would greatly and justly inflame it. Some particularly impudent defiance of his creditors by an insolvent millionaire would attract attention; the legislatures would be sure to interfere, and to sweeping and clumsy statutes would pass the control over these trusts, which the courts of equity should never have given up.

§ 264. The divergence of opinion on the subject arises from there being two different views of morality and policy. According to one view, morality requires that a man should use, and the public weal requires that he should be compelled to use, all his rights of property to pay his debts, in preference to using them for his own pleasure or profit. According to the other view, it is consistent with morality for a man to take and enjoy, and consistent with the public weal to allow him to take and enjoy, rights of property for his pleasure and profit, and to leave his debts unpaid, *provided* the person giving him those rights has declared that they shall not be subject to debts.

§ 265. If the former doctrine cannot literally be said to have been received, *semper, ubique et ab omnibus*, the ex-

try, and all other furniture to the amount of \$500; two cows, ten hogs, one yoke of oxen, a horse or mule, and twenty sheep with food to support such animals for a year, wagons, ploughs, and other farming utensils to the amount of \$300, all the food and fuel necessary for the family for a year, tools of a trade, and also stock in trade not exceeding \$400; the library of any professional man. A community educated under the influence of such laws, and where they are thought calculated "to cherish and support in the bosoms of individuals, those feelings of sublime independence which are so essential to the maintenance of free institutions," (*Franklin v. Coffee*, 18 Tex. 413, 416,) is ripe for the introduction of spendthrift trusts.]

ceptions were insignificant (see § 213, *ante*) until the courts of Pennsylvania gradually slid into the latter doctrine; and, however much some of the judges in that State may regret the new departure, it is now probably too late for them to return to the old road. §§ 234, 235, *ante*. In 1866 the Supreme Court of the United States expressed its approval of the former view; *Nichols v. Levy*, 5 Wallace, 433, 441, § 250, *ante*; but in 1875 it gave its adhesion to the latter. *Nichols v. Eaton*, 91 U. S. 716. The Supreme Court of Massachusetts has also based a decision on the latter view. *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*. It has been a main object of these pages to show that authority is overwhelmingly in favor of the former view.¹ It is submitted that the ethics and policy of the latter are not so clearly preferable as to require a departure from that authority.

§ 265 *a*. In support of his view in *Nichols v. Eaton*, Judge Miller cites the Pennsylvania cases, *Fisher v. Taylor*, 2 Rawle, 33, § 220, *ante*; *Holdship v. Patterson*, 7 Watts, 547, § 221, *ante*; *Ashhurst v. Given*, 5 W. & S. 323, § 223, *ante*; *Brown v. Williamson*, 36 Pa. 338, and *Still v. Spear*, 45 Pa. 168, § 226, *ante*; *Shankland's Appeal*, 47 Pa. 113, § 229, *ante*; also *Nickell v. Handly*, 10 Grat. 336, § 245, *ante*; *Pope v. Elliott*, 8 B. Monr. 56, § 190 *f*, *ante*; and *Leavitt v. Beirne*, 21 Conn. 1, § 196, *ante*; and he refers, finally, to *Campbell v. Foster*, 35 N. Y. 361, § 289, *post*. But the doctrine of *Campbell v. Foster*, has been overruled in New York. See § 290, *post*. *Nichols v. Eaton* is well criticised in 10 Am. L. Rev. 591 *et seqq.*²

¹ [This was perfectly true when written, but now, as has been shown, the courts of several States have followed Mr. Justice Miller's lead in *Nichols v. Eaton*, §§ 240 *h*, *et seqq.*]

² [The opinion in *Nichols v. Eaton* says, *sub finem*: "Other objections

§ 265 *b*. In *Hyde v. Woods*, 94 U. S. 523, *apropos* of the validity of a by-law of the San Francisco Stock Exchange, that the proceeds of the sale of a delinquent member's seat should be first applied to debts due the board, Judge Miller states his continued approval of *Nichols v. Eaton*.

§ 266. *Durant v. Mass. Hospital Ins. Co.*, 2 Lowell, 575. A trust company declared that they would hold \$10,000 in trust to pay the income to S. for life, upon his separate receipt, to be applied to the support of S. and of his wife, and the education and support of their children, which annuity and principal sum were both declared to be inalienable by S., and not subject to his debts or control. S. became bankrupt. His assignees brought a bill against the company, asking that the annuity might be assigned to them. The Court, Lowell, J., held that S. had a full discretion how to dispose of the income, and said, if he became unfit, that a new trustee could be appointed, and such new trustee would have a full discretion in the appropriation of the income. The judge continues: "If this is not so, but

have been urged by counsel. . . . It is said also, that, since his bankruptcy, the defendant Amasa has actually received \$25,000 of this fund. . . . What may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee." My learned friend, Gordon Hughes, Esq., has had the kindness to examine for me the transcript of the record and the briefs of counsel filed in the clerk's office of the Supreme Court. From his examination it appears that Amasa received \$25,000, but that it was before the assignment, not after; and that there was an allegation by the plaintiff that income had been paid by the trustees to Amasa, as a beneficiary, since the bankruptcy, but that the allegation does not seem to have been supported by the proof. So the only point decided in the case was that the discretion of the trustees whether to pay to Amasa or to accumulate could not be interfered with, and the remarks of Judge Miller on spendthrift trusts were in truth, as the learned judge himself treated them, *obiter dicta*.]

the bankrupt is entitled to some part of this income, yet I think it impossible for any court to say what that part is; for the reason that it may be a constantly varying quantity, and that it would be both impracticable and unjust for me to undertake to decree to the assignee an interest for the life of the bankrupt in any such aliquot part. It is plain that, if I cannot do that, I cannot give him anything which will be of value to the creditors. No doubt this amounts to saying that the bankrupt will have some benefit from the trust; but this is the actual result of the English decisions concerning discretionary trusts, which is approved and followed in *Nichols v. Eaton*. This effect is pointed out by Mr. Robson in his work on Bankruptcy (3d ed.), 396; and I do not see how a court can prevent it. The case is a hard one for the creditors." On the separableness of the interests of *cestuis que trust*, see §§ 172, 176, *ante*.

§ 267. *Spindle v. Shreve*, 9 Biss. 199; s. c. 4 Fed. Rep. 136 (Circuit Court North. Dist. Ill.). Devise in Kentucky of land in Illinois to a trustee for the use and benefit of A. during his life, and then to descend to his heirs, without any power or right on A.'s part to encumber the estate, or anticipate the rents, the trustee to pay the rents to A. quarterly. Held, that A.'s interest did not pass to his assignees in bankruptcy. The opinion is based on the *dicta* in *Nichols v. Eaton*, and carries them to their logical conclusion. Here A. was entitled to the rents, the trustee had no discretion as to the time or mode of payment, and yet A. was not obliged to use them to pay his debts. That this decision is the logical conclusion of the *dicta* in *Nichols v. Eaton* is perhaps one of the best criticisms that can be made on them. This case had no parallel at the time

of its decision; but the Supreme Court of Massachusetts has now gone to the same length in *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*.

§ 267 *a*. [The decision of the Circuit Court in *Spindle v. Shreve* purported to go upon the general principles of jurisprudence; but the case was carried by appeal to the Supreme Court of the United States, and from the opinion of that Court (111 U. S. 542) it appears that before the assignment in bankruptcy A. had transferred all his assignable interests to J. The Supreme Court affirmed the decree below, and dismissed the bill, but on the ground that, if the interest which the assignee in bankruptcy sought to reach was assignable, it had been already assigned to J. The Court go on to say, that, if the assignment to J. had not existed, the question whether the interest of A. passed to the assignee in bankruptcy must be determined by the law of Illinois, where the land in question lay, and that by the statute of Illinois property held in trust for a person could not be reached by his creditors, if the trust had been created by some one other than himself. Ill. Rev. Sts. c. 22, § 49. Cf. *Potter v. Couch*, 141 U. S. 296, §§ 124 *r*, *ante*, 267 *c*, *post*.]

§ 267 *b*. [The Court call attention to the fact that the case does not really involve the question "whether, upon general principles of equity jurisprudence, as administered in the courts of the United States," the interest of A. could be taken for his debts, but turned upon the Illinois law. They say that the limits within which spendthrift provisions "may be made and administered, of course, must be found in the law of that jurisdiction which is the *situs* of the property, in case of real estate, and, in cases of personalty, where the trust was created or is to be administered ac-

according to circumstances. And in determining those limits, that law declares how far, and by what forms and modes, the institution of property may be permitted to accommodate itself to the will and convenience of individuals, without prejudice to public interest and policy." Surely a sound exposition of the law, but it would seem an exposition not to be reconciled with the opinion in *Nichols v. Eaton*, where, in the case of a Rhode Island trust, Miller, J., totally disregarded the law of that State as settled by its Supreme Court, § 179, *ante*.¹

§ 267 *c*. [In *Potter v. Couch*, 141 U. S. 296, § 124 *r*, *ante*, it was held that an equitable fee could not be made inalienable, but that the Illinois statute, *supra*, prevented its being reached by creditors. On page 317, the Court say: "The case at bar presents no question of the validity of a proviso that income bequeathed to a person for life shall not be liable for his debts, such as was discussed in *Nichols v. Levy*, 5 Wall. 433, in *Nichols v. Eaton*, 91 U. S. 716, and in *Spindle v. Shreve*, 111 U. S. 452," — a remark which is noteworthy as seeming to indicate that the Court does not feel itself committed to the policy of *Nichols v. Eaton* as against that of *Nichols v. Levy*.]

§ 267 *d*. [*Raynolds v. Hanna*, 55 Fed. Rep. 783 ; s. c.

¹ [It may be said that the Supreme Court of the United States, though following the decisions of the State courts on questions involving legal interests in property, does not follow such decisions on questions involving equitable interests, and there are *dicta*, if not decisions, which look that way. *Neves v. Scott*, 9 How. 196 ; s. c. 13 How. 268. *Russell v. Southard*, 12 How. 139. *Babcock v. Wyman*, 19 How. 289. *Green v. Creighton*, 23 How. 90. But this distinction, which was never sustainable on principle, seems to be disregarded in the later cases. *Lloyd v. Fulton*, 91 U. S. 479. *Brine v. Ins. Co.*, 96 U. S. 627. *Orris v. Powell*, 98 U. S. 176. *Peters v. Bain*, 133 U. S. 670, 685, 686. See, however, *Kirby v. Lake Shore Railroad*, 120 U. S. 130.]

sub nom. Brooks v. Reynolds, 59 Fed. Rep. 923. A testator devised the residue of his estate to a trustee in trust to apply the income in making certain payments, and to divide the remainder of the income into two equal parts, one to be expended by the trustee for the benefit of the testator's son C. and his family, so long as C. should live, or in case the trustee deemed it proper and best, but in no event otherwise, to pay the whole or any portion of such part to C. The other part of the remainder of the income was given for the benefit of the children of A., a deceased daughter of the testator; and in the expenditure of income for the benefit of C. and his family, as well as for the children of A., the testator desired the executor to have in view the maintenance and education of his grandchildren "on a scale comporting with their condition and rank in life," and if, in the judgment of the trustee, the income could not be properly and judicially expended or advanced to C. and his family, and to the children of A., he directed the trustee to invest such surplus as might remain for the benefit of the child or grandchild "who would be entitled to it under the foregoing plan of distribution." The testator further directed that the trustee should hold the estate and distribute and invest the income, as provided, until the youngest child of A. then living should come of age, or until such further period as, in his opinion, the welfare of C. or of the testator's grandchildren would be thereby promoted; and whenever it should so seem prudent to the trustee, but in no event till then, the testator directed him to divide the residue equally among his grandchildren then living, the issue of any deceased grandchild taking the share which such grandchild would have taken if living. The trustee was also

authorized, in case he should deem it prudent and proper so to do, but in no event otherwise, to make advances from the principal to C. for the benefit of himself and his family, in such amounts and at such times as the trustee should deem prudent and safe, but such advances not to be so great as to amount to half the principal, and to be deducted from the amount that would be due to the children of C. under the foregoing provisions.]

§ 267 *e*. [A codicil revoked this last provision of the will authorizing an advance to C. It also directed that the one half of the income to be expended for the benefit of C. and his family should be so expended for his benefit only until the time arrived for the final distribution, and that to this extent the words directing said one half to be expended for his benefit so long as C. should live should be modified and controlled; that said one half of the income which was to be expended for the benefit of C. should, until expended or otherwise disposed of, be held by the trustee in trust to apply as the trustee should think best, and not otherwise, for the benefit of C. and his family; also that any portion of the share of income which might be invested for the benefit of C. should be held by the trustee, the same to be expended for C.'s benefit, or paid to him at such time and in such amounts as the trustee might deem best, and not otherwise. The codicil further directed that unless the executor should have sooner made a final distribution of the estate, such final distribution should be made on the death of C. provided that the youngest child of A. should then be of age; and that, if C. should have no children or grandchildren living at the time of the final distribution, the trustee should hold one half of the estate, as it might then exist, in trust

for C.'s life, giving to C. so much of the income as he might deem best, and on C.'s death distributing the principal to the children and grandchildren of A. It appeared in evidence that at the date of the will C. was a man of spendthrift habits and hopelessly involved in debt.]

§ 267*f*. [A judgment creditor of C. brought a bill to reach C.'s interest under the will. The suit was in the Circuit Court of the United States for the Northern District of Ohio. Judge Jackson, the Circuit Judge, decided that of the one half income of the residue given for the benefit of C. and his family C. was entitled to half, and that this share of his could be reached for his debts. The learned judge pointed out that the Supreme Court has never departed from the English rule, and evidently disapproved of the *dicta* in *Nichols v. Eaton*. The case was taken to the Circuit Court of Appeal, after Judge Jackson had been appointed to the Supreme Court of the United States, and the decree was reversed. The Court thought the case was "within the extremest doctrine of the English courts as to bequests for the maintenance and support of more than one *cestui qui trust*." But they added: "We do not thereby intend to be understood as assenting to the proposition maintained by those courts, that the power of alienation is a necessary incident to a life estate in rents, dividends, or income. That doctrine is not necessarily involved. The great weight of American authority seems to be against the extreme view of the English courts."]

§ 268. *Sandwich Islands*.—Finally, the old law is adhered to in the Sandwich Islands. In *Harris v. Judd*, 3 Hawaii, 421, a testator devised to O. realty and personally, "the income of the same to be paid to him by my executor for his use and support for the term of his life,

and after the death of O." he devised the property to O.'s heirs. Held by the Supreme Court (Allen, C. J., dissenting) that O.'s interest was assignable.

§ 268 *a*. A clause forbidding alienation being invalid in a settlement upon others, it is *a fortiori* invalid in a settlement upon the settlor himself. See §§ 91-95, *ante*. And even where, as in Massachusetts, a clause against anticipation has been held good in a devise of an equitable life estate (*Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*), it has been held bad in a conveyance of property to a trustee in trust to pay the income to the settlor for life, "upon her sole and separate order or receipt, the same not to be by way of anticipation," with a gift over. *Pacific Bank v. Windram*, 133 Mass. 175, § 277 *a*, *post*. [*Jackson v. Von Zedlitz*, 136 Mass. 342.] *Bryan v. Knickerbocker*, 1 Barb. Ch. 409, § 180, *ante*. *McIlvaine v. Smith*, 42 Mo. 45, and *Lackland v. Smith*, 5 Mo. App. 153, § 240 *p*, *ante*. *Mackason's Appeal*, 42 Pa. 330, § 226, *ante*. [*Johnston v. Harvey*, 2 Pa. 82. *Andress v. Lewis*, 17 W. N. C. (Pa.) 270. *Lewis v. Miller*, 21 W. N. C. 94. *Ghormley v. Smith*, 139 Pa. 584. *Warner v. Rice*, 66 Md. 436. See *Stewart v. Madden*, 153 Pa. 445. On the effect of coverture upon settlements by women of their own property, see § 277 *a*, *post*.]

§ 268 *b*. C. gave a life interest which he possessed to trustees in trust during his life, to pay, apply, lay out, and expend the income in and towards the maintenance, clothing, lodging, and support of himself and his present or any future wife, and his children or any of them, or otherwise for their or any of their use and benefit, in such manner as the trustees should in their uncontrolled discretion think proper. This was done at the request of C.'s brother, and

on the consideration of the brother's paying C.'s debts. It was held, by Wood, V. C., that the settlement, being for valuable consideration, and C. having no rights against the absolute discretion of the trustee, the trust was good. *Holmes v. Penney*, 3 K. & J. 90, § 163, *ante*. See § 176, *ante*.

§ 268 c. [In *Bank of Commerce v. Chambers*, 96 Mo. 459, a husband, by releasing his tenancy by the curtesy, was held to be a purchaser for value of an equitable life interest under his wife's will, and a provision that his interest should be free from liability for his debts was held void. See the case more fully stated, § 240 s, *ante*.]

§ 269. The well-recognized exception to the invalidity of restraints on the alienation of life interests which prevails in the case of the separate estate of married women, has been already referred to. §§ 140-142, *ante*. It is perfectly consistent with the general doctrine which underlies this whole subject. That doctrine is, that it is against public policy to permit restraints to be put upon transfers which the law allows. But the common law does not allow married women to transfer their property. The separate estate which allows a transfer is the creature of equity, and it cannot be deemed against public policy for equity to permit its creation to be moulded by a clause against anticipation; for the tendency of such clause is only to put the married woman where the common law has always put her. *Jackson v. Hobhouse*, 2 Mer. 483, 487. *Tullett v. Armstrong*, 4 Myl. & Cr. 377, 393, 394, 405. [See § 256, *ante*.]

§ 270. The only estate to which a restraint upon anticipation can be joined is a married woman's separate estate in equity. [*Stogdon v. Lee*, [1891] 1 Q. B. (C. A.) 661; and see *Baggett v. Meux*, 1 Coll. 138, 147.] What words

will suffice to give a separate estate, this is not the place to consider. See *Hulme v. Tenant*, and notes, 1 L. C. Eq. (5th ed.) 521, (4th Am. ed.) *481; Haynes's Outlines Eq., Lect. VII. The separate estate is generally for life, but it may be a fee or absolute interest; and a clause against anticipation may be attached to a fee when it is separate estate, as well as to a life interest. See §§ 125–131 *k*, 133, *ante*. [The clause against anticipation is valid, although the married woman has been herself the settlor. The law in Massachusetts is otherwise. See § 277 *a*, *post*. On inserting clauses against anticipation in carrying out executory trusts, see § 125 *a*, *ante*.]

§ 271. The restraint against anticipation cannot be removed by any one. [It will not be set aside even to relieve against a married woman's fraud, or breach of trust. *Pemberton v. McGill*, 1 Dr. & Sm. 266. *Arnold v. Woodhams*, L. R. 16 Eq. 29. *Stanley v. Stanley*, 7 Ch. D. 589. *Thomas v. Price*, 46 L. J. N. S. Ch. 761. Nor will acquiescence by the married woman be any excuse to a trustee for disregarding it. *Cocker v. Quayle*, 1 Russ. & M. 535. *Fletcher v. Green*, 33 Beav. 426. *Hale v. Sheldrake*, 60 L. T. 292. *Heath v. Wickham*, 3 L. R. Ir. 376; but on the effect of *laches* in prosecuting a claim see *Derbishire v. Home*, 3 De G. M. & G. 80, 102, 113; *Heath v. Wickham*, 3 L. R. Ir. 376, 390.] Even the Court cannot release it, although to do so would be for the unquestionable advantage of the *feme covert*; *Robinson v. Wheelwright*, 21 Beav. 214; s. c. 6 De G. M. & G. 535; or although she is domiciled in a country where such restraints are unlawful. *Peillon v. Brooking*, 25 Beav. 218.

§ 271 *a*. [The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), § 39, provides that “notwith-

standing that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." The cases decided under this section are numerous. *Hodges v. Hodges*, 20 Ch. D. 749. *Re Lilliwall's Settlement Trusts*, 30 W. R. 243. *Tamplin v. Miller*, Id. 422. *Sedgwick v. Thomas*, 48 L. T. 100. *Musgrave v. Sandeman*, Id. 215. *Re Warren's Settlement*, 52 L. J. N. S. Ch. 928; s. c. 49 L. T. 696. *Ex parte Thompson*, Weekly Notes (1884), 28. *In re Jordan*, 55 L. J. N. S. Ch. 330. *Re Currey*, 56 L. J. N. S. Ch. 389. *Re C's Settlement*, 56 L. T. 299. *Re Little*, 40 Ch. Div. 418. *Latham v. Latham*, Weekly Notes (1889), 171. *Re Radcliffe*, 39 W. R. 457. *Re Milner's Settlement*, [1891] 3 Ch. 547. *Ailesbury v. Ireagh*, [1893] 2 Ch. 345. *Re Flood's Trusts*, 11 L. R. Ir. 355. *Re Wright's Trusts*, 15 L. R. Ir. 331. *Re Segrave's Trusts*, 17 L. R. Ir. 373. *Re Millar*, 25 L. R. Ir. 107. *Re Tenant's Estate*, Id. 522. 80 Law Times, 372, 390.]

§ 271 *b*. [St. 56 & 57 Vict. c. 63, § 2 (1893), enacts that the Court may order the payment out of the property of a *feme covert* plaintiff of the costs of the defendant, although such property be subject to a restraint on anticipation. *Re Godfrey*, 71 L. T. 568.]

§ 272. There is one class of cases, however, in which the courts disregard a restraint upon anticipation attached to a separate estate; and that is, when to regard it would make the estate to which it is attached too remote. The Rule against Perpetuities declares that every estate or interest which requires the happening of a contingency, or the arrival of a time certain, as a condition precedent, is bad, unless the contingency must happen, or the time

must arrive, within a life or lives in being and twenty-one years. An estate in fee simple or a life estate may be given to the unborn child of a living person, because the whole interest must vest, and the child have an estate free from any condition, within the required time. But if there is a clause against anticipation attached to the estate, then the estate cannot be dealt with as a whole, for it is a condition precedent to dealing with the income of each year that the year shall arrive ; and as this may not happen within the time limited by the Rule against Perpetuities, an estate to an unborn child with a clause against anticipation will be too remote. Such estates might be treated in two ways : either they might be declared bad, or else the clauses against anticipation might be disregarded, in which case the estates would be good. The latter method is that which has been adopted. [A third method is possible. The restraint might be considered good for twenty-one years after lives in being, each instalment of income being considered a separate interest, but this seems never to have been suggested.]

§ 272 *a*. The course of decision has been as follows. In *Carver v. Bowles*, 2 Russ. & M. 301, 304, 307, 308 (1831), Sir John Leach, M. R., held that a clause against anticipation attached to a gift under a power to a daughter unborn at the date of the settlement containing the power, was good ; but the only point discussed was whether the power allowed anticipation to be restrained ; the question of remoteness was not alluded to. In *Thornton v. Bright*, 2 Myl. & Cr. 230 (1836), under a power in a marriage settlement to appoint to the children of the marriage, Lord Cottenham, C., held that an appointment to trustees for the separate use of a daughter was good. The ap-

pointment directed that the daughter should have no power of anticipation. Nothing was said about this clause in the arguments, and the Chancellor does not appear to have passed upon its validity. In *Dickinson v. Mort*, 8 Hare, 178 (1850), the same question arose as in *Thornton v. Bright*, and the appointment to separate use, with a clause against anticipation, was held good; but here again the question of remoteness did not occur to court or counsel.

§ 272 *b*. In *Fry v. Capper*, Kay, 163 (1853), Wood, V. C., held that an appointment like that in *Thornton v. Bright* was good, notwithstanding there was a clause against anticipation. All that he had to decide was that the appointment was good; but he strongly intimated that the clause against anticipation was bad for remoteness, and must be rejected. See 3 Jur. N. S. Part 2, p. 213, for an article on *Fry v. Capper* and the earlier cases. In *Armitage v. Coates*, 35 Beav. 1 (1865), Lord Romilly, M. R., gave it as his "strong impression" that such a clause would be too remote; but he said, "I do not express any opinion" on it, and determined the case on a ground which made the decision of the question unnecessary.

§ 272 *c*. In *Re Teague's Settlement*, L. R. 10 Eq. 564 (1870), Vice-Chancellor James held that a clause against anticipation attached to an estate given to an unborn child should be disregarded. This was the first time that the point was distinctly determined. The same question was decided in the same way by Malins, V. C., in *Re Cunyng-hame's Settlement*, L. R. 11 Eq. 324 (1871).

§ 272 *d*. In *Re Ridley, Buckton v. Hay*, 11 Ch. D. 645 (1879), Jessel, M. R., followed the cases cited in the

two preceding sections, but reluctantly, thinking them wrongly determined. He argued that the restraint on anticipation was an exception to the whole law, including the Rule against Perpetuities; that it was not merely an exception to the rule allowing free alienation, "but an exception along the whole line, so to speak." (p. 651.) But was not the decision of the learned judge right, in spite of his own argument against it? The clause against anticipation subjects all dealing with the income of property to a condition, namely, that the income must be earned; but such a condition, when it may continue beyond the time fixed by the Rule against Perpetuities, is as obnoxious to the rule as any other. The rule is peremptory in its character; and the point having been repeatedly adjudged that these cases should not form an exception, it is hard to see the principle on which such exception can be insisted on. The learned judge said that allowing the clause against anticipation in the case of married women was an exception to the rule that all property must be alienable, and as the Rule against Perpetuities is also a rule in favor of alienation, the clause against anticipation ought to be allowed as an exception to that too. But there would seem to be a fallacy here. The general rule that property is alienable, to which the clause against anticipation is an exception, is a rule that people may convey their interests in property, whatever they may be; but the Rule against Perpetuities is not a rule favoring alienation in this sense; its effect is to forbid the creation of certain future estates; it is only a rule favoring alienation in so far as estates subject to remote conditions are not as marketable as those which are not. The possessor of any interest in property could alienate what he had got just as

well if the Rule against Perpetuities did not exist, as he can under it. See § 3, *ante*. [The case of *Hodgson v. Halford*, 11 Ch. D. 959, as is remarked in Marsden, Perpetuities, 281, 282, note (o), seems to have presented the question, but it was not considered. *Re Ridley* and the cases on which it went have been followed in *Re Errington*, Weekly Notes (1887), 23.]

§ 272 *e*. In the case of *Re Ridley, Buckton v. Hay*, 11 Ch. D. 645, the married women the restraint on whose interest was held invalid were in fact born in the lifetime of the testator, although they belonged to a class which might have included persons born after his death; and the same was the case in *Re Michael's Trusts*, 46 L. J. Ch. 651 (1877), where Hall, V. C., held like restraints to be void. But this point was not brought to the attention of the Court in either case; and in *Herbert v. Webster*, 15 Ch. D. 610, Hall, V. C., held that, where the shares in settled property must all be determined within the time prescribed by the Rule against Perpetuities, a clause against anticipation was not void, so far as it attached to the shares of those who were alive at the date of the settlement. See *Wilson v. Wilson*, 28 L. J. N. S. Ch. 95, 4 Jur. N. S. 1076; [Gray, Rule against Perpetuities, §§ 389–392, 441.]

§ 272 *f*. In *Cooper v. Laroche*, 17 Ch. D. 368 (1881), Malins, V. C., adhered to his decision in *Re Cunynghame's Settlement*, L. R. 11 Eq. 324, § 272 *e*, *ante*. He thought that he was not called upon in *Cooper v. Laroche* to decide the point, because the woman to whose daughters the restricted interest was given was past child-bearing at the testator's death, and therefore all the persons who could possibly take were then alive. The fact that the mother was past child-bearing could have no effect on the result.

This has been settled law since *Jee v. Audley*, 1 Cox, 324. But, notwithstanding this palpable error, the decision may be supported on what seems the sound view taken in *Herbert v. Webster*, 15 Ch. D. 610, § 272 *e*, *ante*. See articles in 71 Law Times, 186, and 73 Law Times, 409.

§ 272 *g*. [On the matters discussed in §§ 272–272 *f*, *ante*, see Marsden, Perp. 281–283; Gray, Rule against Perp. §§ 432–437. Where spendthrift trusts are allowed, either by statute or local custom, for unmarried women and for men, the same results would, it is supposed, be reached as have been reached with regard to restraints on anticipation of the separate estates of married women, when to enforce them would violate the Rule against Perpetuities, that is, the interests would be held good and the restraints bad. See *Tarrant v. Backus*, 63 Conn. 277; Gray, Rule against Perpetuities, § 438.]

§ 272 *h*. [In *Willoughby v. Middleton*, 2 J. & H. 344, by the marriage settlement of an infant property was put in trust to pay the income to her for life, without power of anticipation, and she covenanted to settle after acquired property on the same trusts. During coverture property was bequeathed to her. Wood, V. C., held that, if she refused to settle this property, her interest under the trust could, by the doctrine of election, be taken to compensate those injured by her refusal to carry out the covenant. This was disapproved by Jessel, M. R., in *Smith v. Lucas*, 18 Ch. D. 531, and Chitty, J., in *Re Wheatley*, 27 Ch. D. 606, but was followed by the latter judge, though reluctantly, in *Re Queade's Trusts*, 53 L. T. 74, and also by Kay, J., in *Re Vardon's Trusts*, 28 Ch. D. 124; but the last case was reversed by the Court of Appeals, which held that the married woman was not put to her election,

31 Ch. Div. 275, and the same was held in *Hamilton v. Hamilton*, [1892] 1 Ch. 386. What the law would be if the instrument under which the election would take place were entirely independent of the instrument by which the *feme covert's* inalienable interest was created, — for instance, if A. settled property in trust for M., a married woman, with restraint on anticipation, and B., by will, gave the same property to T. and also a legacy to M., — does not appear to have been directly decided, but it is submitted that the married woman would not be put to her election. If she were, she might take the legacy, and give up her income under the trust fund, and then squander her legacy and “pass the rest of her life in that very poverty and need against which the inalienable provision of the settlement was designed to protect her.” *Re Vardon's Trusts*, 31 Ch. Div. 275, 281. See *Robinson v. Wheelwright*, 6 De G. M. & G. 535, 548; *Cahill v. Martin*, 5 L. R. Ir. 227, 248; s. c. 7 L. R. Ir. 361; *sub nom. Cahill v. Cahill*, 8 Ap. Cas. 420, 430; 82 Law Times, 426.]

§ 273. Although interest on securities is often, for many purposes, deemed to accrue *de die in diem*, a married woman who is restrained from anticipation cannot assign the interest until it becomes payable according to the terms of the security. *Re Brettle, Jollands v. Burdett*, 2 DeG. J. & S. 79.

§ 273 a. [When one of the shares of an estate held in common is settled on or devised to a married woman with a clause against anticipation, such share is subject to the costs in a partition suit. *Fleming v. Armstrong*, 34 Beav. 109; and it was held in *Wilton v. Hill*, 25 L. J. N. S. Ch. 156, that in a suit against trustees for an account, a married woman could be a party to a compromise, although her in-

terest was subject to a clause against anticipation. See, however, *Heath v. Wickham*, 5 L. R. Ir. 285.]

§ 273 *b*. [Accrued income in the hands of the trustees is of course liable for obligations contracted after the accrual. *Fitzgibbon v. Blake*, 3 Ir. Ch. 328. See *Everett v. Paxton*, 65 L. T. 383. On the form of a power of attorney to collect income subject to a clause against anticipation, see *Stewart v. Fletcher*, 38 Ch. D. 627.]

§ 273 *c*. [How far, when there is a restraint on anticipation, income which has accrued in the hands of the trustees subsequent to the cause of action can be reached, has been a good deal discussed. Of course income accruing during coverture after the date of the judgment, decree, or order in the case cannot be reached (and see *Morgan v. Eyre*, 20 L. R. Ir. 541); and the better doctrine seems to be that only that portion of a married woman's separate estate which is free from restraint at the time of the creation of an obligation can be made liable therefor, and that consequently, if income has accrued after the creation of the obligation, but before judgment, or if the woman's interest has become free from the restraint on anticipation, as by the death of her husband, before judgment, such income or property cannot be taken to satisfy damages or costs. *Pike v. Fitzgibbon*, 14 Ch. D. 837; s. c. 17 Ch. Div. 454. *Roberts v. Watkins*, 46 L. J. N. S. Q. B. 552. *Re Glanvill*, 31 Ch. Div. 532. *Chapman v. Briggs*, 11 Q. B. D. 27. *Draycott v. Harrison*, 17 Q. B. D. 147. *Myles v. Burton*, 14 L. R. Ir. 258. Some earlier cases to the contrary must be taken to be overruled. *Pemberton v. McGill*, 1 Dr. & Sm. 266 (?). *Butler v. Cumpston*, L. R. 7 Eq. 16. *Claydon v. Finch*, L. R. 15 Eq. 236. *Re Andrews*, 30 Ch. D. 159. See *Hood Barrs v. Cathcart*, [1894] 2 Q. B. (C. A.)

559; also 82 Law Times, 427. But cf. *Cox v. Bennett*, [1891] 1 Ch. (C. A.) 617.]

§ 273 *d.* [*Re Dixon*, 35 Ch. Div. 4. The trustees under a will paid to a married woman money which they should have paid to the trustees of her marriage settlement under which she took a life interest with restraint upon anticipation. She was ordered by the Court to pay the amount so received by her to the trustees of the settlement. Part of it she had spent. There was accrued income on her share in the hands of the trustees of the will. The Court of Appeal held that so much of this income as had accrued before the order for repayment should be applied in discharge of the deficit.]

§ 273 *e.* [*Hyde v. Hyde*, 13 P. Div. 166. A husband having obtained a decree for divorce, the wife was ordered to give up the children to him. She did not comply with the order, and a sequestration was issued against her estate. She had separate estate subject to a restraint on anticipation. The Court of Appeal held that the income accrued at the time of the order of sequestration could be reached, although the income accruing afterwards could not. In *Hood Barrs v. Catheart*, [1894] 2 Q. B. 559, 565, 572, *Hyde v. Hyde* is distinguished from *Pike v. Fitzgibbon*, *ubi supra*, and the like cases, on the ground that it was not to enforce a previous obligation, but was a process for contempt.¹]

§ 274. There was at one time in England great doubt

¹ [On the question how far the accrued income of property subject to restraint against anticipation can be reached for debt under the English Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), see *Cox v. Bennett*, [1891] 1 Ch. (C. A.) 617; *Hood Barrs v. Catheart*, [1894] 2 Q. B. 559; *Re Lumley*, Weekly Notes, (1894) 77, corrected *Id.* 80; *Pillers v. Edwards*, *Id.* 212.]

whether a restraint against anticipation placed on the property of a single woman would become effectual upon her marriage, and also, what is really the same question, whether such a restraint imposed on a married woman, and which ceased on her becoming a widow, would revive on her second marriage. Lord Cottenham, C., in *Mussey v. Parker*, 2 Myl. & K. 174, said it would not; but he subsequently decided the contrary, in *Tullett v. Armstrong*, 4 Myl. & C. 377, affirming the decree of Lord Langdale, M. R., 1 Beav. 1; and it is now settled that a restraint against alienation will not bind a woman so long as she is single or a widow, but will bind her whenever she is married, unless the testator or settlor has limited the restraint to a particular coverture.¹

§ 274 *a*. [Under the Married Women's Acts of 1870 (33 & 34 Vict. c. 93, § 12) and of 1882 (45 & 46 Vict. c. 75, § 19), a married woman's property, though settled on her subject to restraint on anticipation, is liable for her ante-nuptial debts. *Sanger v. Sanger*, L. R. 11 Eq. 470. *London & Provincial Bank v. Bogle*, 7 Ch. D. 773. *Re Hedgely*, 34 Ch. D. 379. *Axford v. Reid*, 22 Q. B. Div. 548. *Jay v. Robinson*, 25 Q. B. Div. 467. *Kirk v. Murphy*, 30 L. R. Ir. 508. See *Beckett v. Tasker*, 19 Q. B. Div. 7; *Nicholls v. Morgan*, 16 L. R. Ir. 409. Other cases under recent English statutes are *Pratt v. Jenner*, L. R. 1 Ch. 493; *Re Keane*, L. R. 12 Eq. 115; *Waite v. Morland*, 38 Ch. D. 135; *Re Onslow*, 39 Ch. D. 622; *Braunstein v. Lewis*, 64 L. T. 265; s. c. 65 L. T. 449;

¹ A woman may, of course, so deal with separate estate, while unmarried, as to destroy the separate character of the property, and it will then become her husband's on coverture. See 1 L. C. Eq. (5th ed.) 570-572; *Nix v. Bradley*, 6 Rich. Eq. 43; [*Re Wood*, 61 L. T. 197.]

Harrison v. Harrison, 13 P. Div. 180; *Whittaker v. Kershaw*, 45 Ch. Div. 320; *Cox v. Bennett*, [1891] 1 Ch. (C. A.) 617; *Stogdon v. Lane*, [1891] 1 Q. B. (C. A.) 661; *Michell v. Michell*, [1891] P. 166, 203, 305. See 90 Law Times, 422; *Hood Barrs v. Catheart*, [1894] 2 Q. B. 559; *Re Lumley*, Weekly Notes (1894), 77, corrected Id. 80; *Pillers v. Edwards*, Id. 212.]

§ 274 *b*. [A widow having a life interest in property mortgaged it to A., and then married, upon which a restraint upon anticipation on part of her life interest revived. She subsequently charged her interest, so far as she could, in favor of P. Held that the securities must be marshalled, and the interest on A.'s mortgage paid out of that part of the income which was subject to the restraint upon anticipation, leaving the part which was free from such restraint to meet P.'s charge. *Re Loder's Trusts*, 56 L. J. N. S. Ch. 230.]

§ 275. When the question has come up in America, *Tullett v. Armstrong* has been followed. *Nix v. Bradley*, 6 Rich. Eq. 43. *Fears v. Brooks*, 12 Ga. 195. *Robert v. West*, 15 Ga. 122. *Beaufort v. Collier*, 6 Humph. 487. *Phillips v. Grayson*, 23 Ark. 769. *Bridges v. Wilkins*, 3 Jones, Eq. 342, overruling anything to the contrary in *Apple v. Allen*, Id. 120, and *Miller v. Bingham*, 1 Ired. Eq. 423. [*Robinson v. Randolph*, 21 Fla. 629.] See *Schafroth v. Ambs*, 46 Mo. 114. [But cf. the law in Pennsylvania, §§ 276, 277, *post*.]

§ 275 *a*. [In the English Chancery it is the clause against anticipation which restrains the alienation by a married woman of her separate estate. If there is no clause against anticipation, a *feme covert* can dispose of her separate estate. What amounts to a conveyance, or

to the creation of a lien or of a right to look to the separate estate for payment, is a matter upon which there has been a difference of opinion, but that a married woman has the power to convey her separate estate, or to create a lien or give a right against it, is clear, not only in England, but in most of the United States.]

§ 275 *b*. [But in two States, and it would seem at the present day in two States only, a married woman can convey her separate property in no other way than as is expressly provided in the instrument creating the separate trust. If that instrument is silent on the mode of disposition, the *feme covert* cannot dispose of the property at all; she is restrained from alienation except so far as it is expressly permitted to her. These States are South Carolina and Pennsylvania. *Ewing v. Smith*, 3 Des. 417. *Robinson v. Dart*, Dudl. Eq. 128. *Reid v. Lamar*, 1 Strob. Eq. 27. (See *Porcher v. Daniel*, 12 Rich. Eq. 349.) *Dunn v. Dunn*, 1 S. Car. 350.¹ *Lancaster v. Dolan*, 1 Rawle, 231. *Thomas v. Folwell*, 2 Whart. 11. *Wallace v. Coston*, 9 Watts, 137. *Rogers v. Smith*, 4 Pa. 93. *Wright v. Brown*, 44 Pa. 224. *Jones's Appeal*, 57 Pa. 369. *Maurer's Appeal*, 86 Pa. 380. *MacConnell v. Lindsay*, 131 Pa. 476. *Quin's Estate*, 144 Pa. 444. See 1 L. C. Eq. (4th Am. ed.) 735-737, 745, 746; Bisp. Eq. § 103. Any decisions or *dicta* to the same effect in Rhode Island, New York, Maryland, or Tennessee have been overruled. *Ives v. Harris*, 7 R. I. 413. *Jaques v. Methodist Episcopal Church*, 17 Johns. 548 (overruling 3 Johns. Ch. 77). *Cooke v. Husbands*, 11 Md. 492. *Young v. Young*, 7

¹ [The South Carolina Courts allow the separate estate to be charged for its own benefit, that is, for purposes in furtherance of the trust created. *Cater v. Eveleigh*, 4 Des. 19. *James v. Mayrant*, Id. 591.]

Cold. 461. But see *Machir v. Burroughs*, 14 Ohio St. 519.]

§ 275 *c.* [In a few other States, although, if nothing is said about power of disposal, the *feme covert* may alienate as she pleases, yet if a mode of alienation is indicated, e. g. by deed or by will, the principle of interpretation, *Expressio unius est exclusio alterius*, is applied, and no other mode of alienation can be adopted. The language of the cases is often so vague that it is difficult to state the law with precision, but this seems to be the rule of construction in Rhode Island. *Metcalf v. Cook*, 2 R. I. 355, as explained in *Ives v. Harris*, 7 R. I. 413. So in Maryland. *Turr v. Williams*, 4 Md. Ch. 68. *Williams v. Donaldson*, Id. 414. *Miller v. Williamson*, 5 Md. 219; explained in *Cooke v. Husbands*, 11 Md. 492. And in Mississippi, *Montgomery v. Agricultural Bank*, 10 Sm. & M. 566. Also in Tennessee, *Morgan v. Elam*, 4 Yerg. 375; *Marshall v. Stephens*, 8 Humph. 159; *Ware v. Sharp*, 1 Swan, 489; *Hoyle v. Smith*, 1 Head, 90; *Campbell v. Fields*, 1 Cold. 416; all commented on in *Young v. Young*, 7 Cold. 461. The statements in the text-books (e. g. Bisp. Eq. § 103; 2 Perry on Trusts, § 655), that in all or some of the jurisdictions mentioned in this section the South Carolina rule is followed, are not supported by the authorities.]

§ 275 *d.* [In Virginia, "whether the specification of one mode of disposition in the settlement is an exclusion of the right to pursue any other . . . seems not yet to be finally settled." *Nixon v. Rose*, 12 Grat. 425, 431, 432. In Illinois, in *Swift v. Castle*, 23 Ill. 209, 222, it was held "that a married woman can only convey her trust property in the manner authorized, and for the purposes specified,

in the instrument creating the trust, if it contain any such provisions; otherwise she may dispose of it, without restraint either as to manner or purpose." But there is language in later cases which favors the South Carolina and Pennsylvania doctrine. *Bressler v. Kent*, 61 Ill. 426. *Conkling v. Dougl*, 67 Ill. 355. *Ennor v. Hodson*, 134 Ill. 32.]

§ 275 *e*. [When a statute makes the estate of a married woman separate property, such estate may or may not be alienable like equitable separate property, and the provisions of the statute may or may not apply to equitable separate property; all depends upon the words of the statute. See *Lippincott v. Mitchell*, 94 U. S. 767; *Cookson v. Toole*, 59 Ill. 515; *Bressler v. Kent*, 61 Ill. 426; *Pennsylvania Ins. Co. v. Foster*, 35 Pa. 134; *Wright v. Brown*, 44 Pa. 224; *Shonk v. Brown*, 61 Pa. 320; *MacConnell v. Lindsay*, 131 Pa. 146; *Short v. Battle*, 52 Ala. 456.]

§ 276. In Pennsylvania there is another departure from the received doctrine. As we have seen (§§ 214–216, *ante*), trusts in that State are deemed passive whenever it is possible to consider them so, and in passive trusts, whether of real or personal estate, the *cestui que trust* is vested with the legal title. A trust for the separate use of a married woman is deemed an active trust, because, unless it is so considered, it cannot be preserved from her husband or his creditors. *Lancaster v. Dolan*, 1 Rawle, 231, 247. *Hartley's Estate*, 13 Phil. 392. [Cf., however, *Carson v. Fuhs*, 131 Pa. 256.] But whenever a married woman for whom property is held as her separate estate, with or without a clause against anticipation, becomes discoverd, the trust is held to become passive, the legal estate passes to her, and the trust is destroyed, and

does not revive on a subsequent marriage. So a trust of like kind for a single woman vests in her the legal estate, and the trust becomes extinct, and is not revived on her marriage. Such trusts are, however, allowed when made in contemplation of a particular marriage. The leading case is *Hamersley v. Smith*, 4 Whart. 126, in which, following *Massey v. Parker*, 2 Myl. & K. 174, it was held that a trust for the separate use of a woman ceased on her husband's death, and did not revive on her second marriage. See *Freyrogle v. Hughes*, 56 Pa. 228; *Megargee v. Naglee*, 64 Pa. 216; *Rea v. Cassel*, 13 Phil. 159; [*Steacy v. Rice*, 27 Pa. 75; *House v. Spear*, 1 W. N. C. 34; *Williams's Appeals*, 83 Pa. 377; *Pelerin v. Queripel*, 4 W. N. C. 330; *Shalters v. Ladd*, 141 Pa. 349; *Pillion's Estate*, 35 W. N. C. 68.] In *Kuhn v. Newman*, 26 Pa. 227, trusts for the separate estate of a woman were held not to become operative on a subsequent marriage not in contemplation at the creation of the trust; and so it was again held in *McBride v. Smyth*, 54 Pa. 245; *Oyden's Appeal*, 70 Pa. 501; *Snyder's Appeal*, 92 Pa. 504,¹ [(overruling *Hughes's Estate*, 7 W. N. C. 539); *Yarnall's Appeal*, 70 Pa. 335; *Campbell v. Ingersoll*, 2 W. N. C. 13; *Philadelphia Trust Co.'s Appeal*, 93 Pa. 209; *Hetrick v. Addams*, 12 W. N. C. 367; *Neale's Appeal*, 104 Pa. 214; *Stevenson's Estate*, 19 W. N. C. 291; *Bristor v. Tasker*, 135 Pa. 110; *Hildeburn's Estate*, 8 Pa. C. C. 869; s. c. 27 W. N. C. 471; *Quin's Estate*, 144 Pa. 444 (overruling s. c. *sub nom. Funk's Es-*

¹ *Snyder v. Snyder*, 10 Pa. 423, holds that chattels given to a widow for her separate use do not pass to her second husband. The case does not seem to be noticed in the later decisions, but must be taken to be overruled by them.

tate, 9 Pa. C. C. 113, s. c. 27 W. N. C. 473); *Biddle's Estate*, 15 Pa. C. C. 401.] In *Wells v. McCull*, 64 Pa. 207, it was held that a trust for a separate estate made in "immediate contemplation of marriage" was good. So in *Springer v. Arundel*, 64 Pa. 218, and *Ash v. Bowen*, 10 Phil. 96. See *Dodson v. Ball*, 60 Pa. 492; *Pickering v. Coates*, 10 Phil. 65; *Eastwick's Estate*, 13 Phil. 350. [Trusts under which women are given life interests are often held active for the sake of those in remainder, and spendthrift trusts (see §§ 214–235 *h*) can be made in Pennsylvania for a woman, married or single, as well as for any one else. *Ashhurst's Appeal*, 77 Pa. 464. *Delbert's Appeal*, 83 Pa. 462. *Dunn's Appeal*, 85 Pa. 94. *Lightner's Appeal*, 11 W. N. C. 181. *Kuntzleman's Estate*, 136 Pa. 142. *Forney's Estate*, 161 Pa. 209. *Schell's Estate*, 15 Pa. C. C. 372.]

§ 277. The results reached in Pennsylvania are curious. Persons *sui juris* are allowed the benefit of property which their creditors cannot touch; but trusts for the benefit of married women, who are not *sui juris*, which have been favored in all other jurisdictions, are in Pennsylvania kept within the strictest limits. [See also the following section.]

§ 277 *a*. [We have seen that a condition or conditional limitation, or a restraint on alienation, attached to an equitable life interest is bad, when the person having the life interest is himself the settlor, §§ 90 *et seqq.*, *ante*, but when a woman by a marriage settlement settles her own property upon herself with a clause against anticipation, such clause will hold good during coverture. *Clive v. Carew*, 1 J. & H. 199. *Arnold v. Woodhams*, L. R. 16 Eq. 29. See *Beckett v. Tasker*, 19 Q. B. D. 7; *Smith v. Whitlock*, 55 L. J. N. S. Q. B. 286; *Hemingway v. Braithwaite*, 61

L. T. 224. But] in *Pacific Bank v. Windram*, 133 Mass. 175, see § 268, *ante*, a married woman conveyed personal property to trustees, in trust to pay the income to herself for life, “upon her sole and separate order or receipt, the same not to be by way of anticipation,” with a gift over. She and her husband assigned all her interest in the income. Held that the assignment was good. To appreciate the effect of this decision, it must be borne in mind that in Massachusetts such assignment, if made by a man upon whom property not his own had been settled with a like clause against anticipation, would not have been good. *Broadway Bank v. Adams*, 133 Mass. 170, § 240 *b*, *ante*. [In *Pacific Bank v. Windram*, the settlement was after marriage; a like result was reached in a case where the settlement was before marriage. *Jackson v. Von Zedlitz*, 136 Mass. 342.] In Massachusetts, therefore, the law is, that in a settlement upon a person other than the settlor, or in a devise, a clause against anticipation of an equitable life interest is good, whether the life tenant be a married woman or not; but that a clause against anticipation of an equitable life interest settled upon the settlor is bad, whether the settlor be a married woman or not; that is, married women are treated in these matters just like the rest of the world. [In *Ghormley v. Smith*, 139 Pa. 584, the Supreme Court of Pennsylvania held that a spinster, not then in contemplation of marriage, could not settle her property upon herself for life, so as to protect such estate from her creditors during a subsequent coverture. See also *Stewart v. Madden*, 153 Pa. 445, and § 276, *ante*.] It is singular that Pennsylvania and Massachusetts, the two jurisdictions which led the departure from the common law world in allowing spendthrift trusts for men, are

also the two which have thrown aside a protection given elsewhere to the separate estates of married women. [Whether any of the other States which have recently followed Pennsylvania and Massachusetts in adopting spendthrift trusts will also follow them in this modification of the law as to married women, remains to be determined.]

D.

ESTATES FOR YEARS.

§ 278. As we have seen, § 101, *ante*, a condition against alienation attached to an estate for years is valid; but can a man be compelled to remain a tenant for years in spite of himself? Will not an assignment always be operative to take the estate from the assignor, although it may subject the estate to forfeiture in the hands of the assignee?¹ There is no authority on the point except *Hobbs v. Smith*, 15 Ohio St. 419, in which a provision that a term for ninety-nine years should not be liable for the debts of the lessee, there being no condition or gift over, was held void. This follows the analogy of estates for life, and seems in accordance with principle; in the absence, therefore, of any authority to the contrary, it may be assumed to be a correct statement of the law. [In those States where spendthrift trusts are allowed there seems to be no decision or *dictum* as to the treatment of terms for years. Some curious and difficult questions may arise with regard to them.]

§ 278 *a*. If an estate for years is the separate property of a married woman, a restraint on its anticipation is undoubtedly good.

¹ The continuance of the tenancy must not be confounded with liability on the covenants of a lease. The original lessee remains bound by the covenants, though he has made a valid assignment of the term.

SUMMARY.¹

FORFEITURE FOR ALIENATION.

§ 279. A. *Fee Simple*. — An *unqualified* condition or conditional limitation on alienation *either in general or in any particular mode*, cannot be joined to a fee simple or to an absolute interest in personalty. §§ 13–30, 55–56 g.

A condition or conditional limitation on alienation *to certain specified persons* can probably be attached to a fee simple or to an absolute interest in personalty; but how far a condition or conditional limitation on alienation *except to certain specified persons* can be so attached is doubtful. §§ 31–44.

A condition or conditional limitation on alienation of an estate or interest while *contingent* is good; but [except in the Province of Ontario] if a fee simple or an absolute interest in personalty has *vested*, a condition or conditional limitation against alienation attached to it is void, *however limited in time*. §§ 45–54.

A condition or conditional limitation attached to a fee simple or an absolute interest in personalty to take effect if the owner does *not* alienate, e. g. if he dies intestate without having disposed of the estate, is, though without sufficient reason, held void. §§ 57–74 g.

B. *Fee Tail*. — A condition or conditional limitation on alienation attached to an estate in fee tail is good, but

¹ This summary does not give the statutory changes.

is destroyed by barring the estate, and the barring of an estate tail cannot be restrained by any condition or conditional limitation. §§ 75-77.

C. *Estate for Life*. — A condition or conditional limitation on alienation is good when attached to a life estate or interest in either realty or personalty. §§ 78-96.

Exception. If the life tenant is the settlor, a condition or conditional limitation is bad on involuntary alienation; how far it is good on voluntary alienation is doubtful. §§ 90-100.

D. *Estate for Years*. — A condition or conditional limitation on alienation attached to an estate for years is good. §§ 101-103.

RESTRAINT ON ALIENATION.

A. *Fee Simple*. — Any provision restraining the alienation, voluntary or involuntary, of an estate in fee simple or an absolute interest in chattels real or personal, whether legal or equitable, is void. §§ 105-124.

Exception 1. In Pennsylvania the law is doubtful. §§ 124 *a*-124 *k*.

Exception 2. In Massachusetts a provision that the absolute present owner of property shall not receive it till reaching a certain age is valid. §§ 124 *l*-124 *p*.

Exception 3. Married women may be restrained from the voluntary or involuntary alienation of their separate estates. §§ 125-131 *k*.

B. *Fee Tail*. — Any provision restraining the alienation of an estate tail is destroyed by the barring of the estate. § 132.

Exception. If an equitable fee tail, being the separate estate of a married woman, is subject to a provision against

alienation, the fee simple which arises on the barring of the estate tail is subject to a like provision. § 133.

C. *Estate for Life*. — Any provision restraining the alienation, voluntary or involuntary, of a life estate or interest, in realty or personalty, whether legal or equitable, is void. §§ 134-213, 268-268 *b*.

[The sound doctrine on the subject of the power to alienate life interests and of their liability for debts, may, it is submitted, be stated in three propositions: (1) All rights to enjoy property, or to have its income paid to one, or expended or applied for one's benefit, during life, are alienable and can be taken for debts; and if the right to the whole or to any part of the income of a trust fund is exclusive, any provisions against anticipation, or as to the times or amounts of payment or the mode of expenditure or application, are inoperative as against an assignee or creditor. (2) If the right is not exclusive, but trustees can give the use or income to such one or more of several persons as they see fit, the trustees cannot be compelled to allow the use or pay the income to the assignee or creditor of any particular person; but after having notice of the assignment, voluntary or involuntary, of the interest of such person, they cannot pay to him or apply for his benefit any part of the income, and if they do so they must account for it to the assignee. (3) Although no restraint on the alienation of a life interest or on its liability for debts can be imposed for the benefit, real or supposed, of the one having the life interest, it can be imposed for the benefit of other persons. Thus, if one has acquired by purchase the right to be a life member of a club, the club cannot be compelled to admit his assignee.]

Exception 1. In Pennsylvania and Massachusetts an

equitable life interest, when the life tenant is not the settlor, may be subjected to a provision against alienation. §§ 214-240 *g*. [So now also in Illinois, Maine, Maryland, Mississippi, Vermont, Missouri, and Tennessee, and probably also in Delaware, Indiana, and Virginia. §§ 240 *h*-249 *b*.] In the Federal Courts the authorities are conflicting. §§ 250-268 *a*.

Exception 2. Married women may be restrained from the alienation, voluntary or involuntary, of their separate life estates or interests, but in Pennsylvania and Massachusetts women, married or single, cannot so settle their own property as to preserve it from creditors during coverture. §§ 269-277 *a*.

D. *Estate for Years.* — Any provision restraining the alienation of an estate for years is void, *semble*. § 278.

Exception. Married women can be restrained from the alienation, voluntary or involuntary, of estates for years which are their separate property. § 278 *a*.

APPENDIX I.

DECISIONS UNDER STATUTES.

A. *New York.*

§ 280. APART from statute, the invalidity of restraints against alienation attached to equitable life interests has been held as strictly in New York as anywhere. See §§ 180, 181, *ante*. But the matter is now entirely governed by statute, and the modern New York decisions throw, therefore, no light on the points which have been considered. As, however, those decisions have sometimes been erroneously referred to as authorities on the general question, and as it may be convenient to have them collected, the statutes, with the cases under them, are here given. [See 16 Abb. N. C. 20-42, note.]

§ 281. The sections of the Revised Statutes affecting the matter are as follows:—

Part 2, chapter 1, treats of Real Property; of this chapter, title 2, art. 2, contains the following sections.

“§ 45. Uses and trusts, except as authorized and modified in this article, are abolished.”

“§ 55. Express trusts may be created for any or either of the following purposes:—

“1. To sell lands for the benefit of creditors.

“2. To sell, mortgage, or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon.

“3. To receive the rents and profits of lands, and apply them to the education or support only¹ of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title.”²

“4. To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first article of this title.”

“§ 57. Where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable, in equity, to the claims of the creditors of such person, in the same manner as other personal property which cannot be reached by an execution at law.”³

“§ 63. No person beneficially interested in a trust for the receipt of the rents and profits of land can assign or in any manner dispose of such interest;⁴ but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable.”⁵

“§ 65. Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void.”

¹ This was the language of the section as originally reported by the revisers. For its change by the legislature, see § 283, *post*.

² These rules do not touch the present question.

³ The statement in *Clute v. Bool*, 8 Paige, 83, 87, that this section was not originally reported by the revisers, but was introduced by the legislature, is incorrect. 3 N. Y. Rev. Sts. (2d ed.) 579.

⁴ [See *Estate of Hoyt*, 12 N. Y. Civ. Proc. 208.]

⁵ [See *Radley v. Kuhn*, 97 N. Y. 26.]

In Part 3, chapter 1, title 2, art. 2, on the general powers of the Court of Chancery, are the following sections.

“§ 38. Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and any other person, to compel the discovery of any property or thing in action due to him, or held in trust for him; and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant [except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself].¹

“§ 39. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgment, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him [with the exception above stated],¹ which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not.”

[These last two sections of the Revised Statutes were repealed in 1880. Since that time the law on the subject in question has been contained in the Code of Civil Procedure of 1880. Chap. 15, title 4, art. 1, is on “Judgment Creditor’s Action.” It provides for a judgment creditor with an unsatisfied execution obtaining satisfaction

¹ These clauses in brackets were not in the original revision, but were added by the legislature. 3 N. Y. Rev. Sts. (2d ed.) 669.

of his debt in much the same manner as §§ 38, 39, *supra*. § 1879 of the Code declares that the article does not "authorize the discovery or seizure of, or other interference with, . . . any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Chap. 17, title 12, art. 1, of the Code, "On Supplementary Proceedings," declares, in § 2463, that the article does not "authorize, &c.," repeating *verbatim* the language of § 1879, *supra*.]

§ 282. This crude and reckless legislation seems to have been as unsuccessful in practice as it deserved to be. It has led to great litigation, and there has been the utmost difference of opinion on points which ought to have been put beyond doubt. The revisers seem to have looked at the subject of trusts solely from a conveyancer's point of view, and with the object of simplifying titles. This is shown by the fact that they have made no provisions with regard to personalty similar to those of Part 2, c. 1, tit. 2, art. 2. Their intention evidently was to pass the legal title to every one except to those who were legally or naturally incapable of managing property. In their notes to article 2 they say: "An assignment for the benefit of creditors would in most cases be entirely defeated if the title were to remain in the debtor, and where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift, (the general objects of trusts of this description,) the utility of vesting the title and possession in the trustees is sufficiently apparent." 3 N. Y. Rev. Sts. (2d ed.) 585. In fact, in order to sim-

plify conveyancing, and not warned by the history of the Statute of Uses, the revisers determined to destroy trusts in land (and in land only) by not allowing any one to enjoy any interest in land without having the legal title, except in the case of those persons who were not legally fit to have it; and to prevent any difficulty arising in the transfer of land in those cases where the legal title was separated from the equitable, they provided that in such cases the land could not be transferred at all. §§ 63, 65.¹

§ 283. To prevent abuse, however, they provided that any surplus of rents and profits, not needed for education and support, should be liable in equity to the debts of the *cestui que trust*; but, apparently forgetting this, the legislature, when they came to give remedies in equity, provided that trust property might be taken in equity for debts, "except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." (Part 3, c. 1, tit. 2, art. 2, § 38.) Although this last section contradicts the provisions of Part 2, c. 1, tit. 2, art. 2, these latter had a certain consistency among themselves. But this was soon destroyed. In the third clause of § 55 the words "or support only" were stricken out, and "and support or either" were inserted by the legislature. And in 1830 the revisers recommended, and the legislature adopted, an amendment, by which the words "education and support or either" were stricken

¹ A power authorizing, for the purpose of changing the investment, the sale of land held in trust, is held, however, not to be in violation of §§ 63, 65. *Belmont v. O'Brien*, 12 N. Y. 394. See *Roosevelt v. Roosevelt*, 6 Hun, 31; s. c. 64 N. Y. 651; *Hawley v. James*, 5 Paige, 318, 444; *Marvin v. Smith*, 56 Barb. 600, 605; *Heermans v. Robertson*, 5 T. & C. 596; s. c. 64 N. Y. 332; *Fellows v. Heermans*, 4 Lans. 230; *Cruger v. Jones*, 18 Barb. 467.

out, and the word "use" inserted. 3 N. Y. Rev. Sts. (2d ed.) 579. So that the clause now reads, "To receive the rents and profits of lands, and apply them to the use of any person," &c. No corresponding change was made in the other sections, and thus equitable interests were allowed to be created for persons *sui juris* and competent, and yet they were not authorized to alienate them (always provided they were realty).

§ 284. In this condition the statutes were turned over to the courts to deal with them as best they could. See *Gott v. Cook*, 7 Paige, 521, 536; *Coster v. Lorillard*, 14 Wend. 265, 321, 330, 332, 352, 377; *Hawley v. James*, 16 Wend. 61, 147, 148; *Downing v. Marshall*, 23 N. Y. 366, 378, 379; *Graff v. Bonnett*, 31 N. Y. 9, 19-21, 24-31; *Wetmore v. Truslow*, 51 N. Y. 338, 342; *Rome Exchange Bank v. Eames*, 4 Abb. Ct. App. 83, 99; [*Salsbury v. Parsons*, 36 Hun, 12; *Cochrane v. Schell*, 140 N. Y. 516, 532.]

§ 285. A question rose early into great prominence. By the provision that an express trust might be created to receive the rents and profits of lands, and apply them to the use of any person, was it meant to allow trusts only when the trustees had to apply the money, or was it meant to allow them when the trustees had merely to pay the money over? The latter interpretation was certainly inconsistent with the scheme as originally framed, and was letting in by a side door many of those trusts which had been so ostentatiously thrust forth from the front; but after great conflict it finally prevailed. *Leggètt v. Perkins*, 2 Comst. 297. [*Moore v. Hegeman*, 72 N. Y. 376.] See *Noyes v. Blake-man*, 3 Sandf. S. C. 531, 541; s. c. 6 N. Y. 567; *Campbell v. Low*, 9 Barb. 585; *Tobias v. Ketchum*, 32 N. Y.

319, 330; *Jarvis v. Babcock*, 5 Barb. 139; [*Cochrane v. Schell*, 140 N. Y. 516, 532.] For earlier cases see *Gott v. Cook*, 7 Paige, 521; *Clute v. Bool*, 8 Paige, 83; *Van Epps v. Van Epps*, 9 Paige, 237; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Coster v. Lorillard*, 14 Wend. 265; *Hawley v. James*, 16 Wend. 61. [The trust cannot be properly terminated by the trustee paying the whole fund to the only *cestuis que trust*. *Lent v. Howard*, 89 N. Y. 169. Cf. *Radley v. Kuhn*, 97 N. Y. 26, 32.]

§ 286. As has been said, the revisers, having in view only simplifying the transfer of land, did not limit the trusts which might be created in personal property, thus making a new distinction between real and personal estate, when the distinctions which already prevail are among the chief *opprobria* of the common law, and when the whole course of civilization and of the natural growth of the law has been to minimize these distinctions. It has never been disputed in New York that, notwithstanding the Revised Statutes, trusts of personalty may be created for any purpose which was lawful before the statute. See *Gott v. Cook*, 7 Paige, 521, 534; *Kane v. Gott*, 24 Wend. 641, 661; *Leggett v. Perkins*, 2 Comst. 297, 313; *De Peyster v. Clendinning*, 8 Paige, 295, 305; *Everitt v. Everitt*, 29 N. Y. 39, 71; *Vail v. Vail*, 7 Barb. 226, 238; *Brown v. Harris*, 25 Barb. 134; *Hagerty v. Hagerty*, 9 Hum, 175; [*Gilman v. McArdle*, 99 N. Y. 451; *Cochrane v. Schell*, 140 N. Y. 516, 534. Leascholds, however, were held in *Bennett v. Rosenthal*, 11 Daly, 91, 94, to come within the provisions of the Revised Statutes.] But is the clause of the Revised Statutes, § 63, which declares trusts of real estate inalienable, to be extended to trusts of personalty? The argument for its extension is to be found in Rev. Sts., Part 2, c. 4, title 4,

§§ 1, 2. § 1 provides that the ownership of personal property shall not be suspended by any limitation or condition whatever for more than two lives. § 2 provides that, "in all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act in relation to future estates in lands." It is clearly shown by Cowen, J., in *Kane v. Gott*, 24 Wend. 641, and Denio, C. J., in his dissenting opinion in *Graff v. Bonnett*, 31 N. Y. 9, 19-25, that this clause applies only to the provisions concerning future interests in the first chapter, and that trust interests to commence immediately on the execution of the trust deed or the death of the testator are not future interests. To the same effect are *Grout v. Van Schoonhoven*, 1 Sandf. Ch. 336; *Arnold v. Gilbert*, 5 Barb. 190, 198; *Cruger v. Cruger*, Id. 225, 266; *Vail v. Vail*, 7 Barb. 226, 238; *Brown v. Harris*, 25 Barb. 134; *Titus v. Weeks*, 37 Barb. 136, 149. Chancellor Walworth, however, in several decisions, held that the Revised Statutes made trusts of personalty inalienable. *Hallett v. Thompson*, 5 Paige, 583. *Hone v. Van Schaick*, 7 Paige 221, 233, 234. *Clute v. Bool*, 8 Paige, 83. *Degraw v. Clason*, 11 Paige, 136. And the weight of authority, though not of reason, is now the same way. *Arnold v. Gilbert*, 3 Sandf. Ch. 531, 554, 555. *Rider v. Mason*, 4 Sandf. Ch. 351. *Graff v. Bonnett*, 2 Robertson, 54; s. c. 31 N. Y. 9, 13. *Campbell v. Foster*, 35 N. Y. 361, 371. *Roosevelt v. Roosevelt*, 6 Hun, 31; s. c. 64 N. Y. 651. *Scott v. Nevius*, 6 Duer, 672. And see *Hone v. Van Schaick*, 20 Wend. 564; *Havens v. Healy*, 15 Barb. 296, 301; *Williams v. Thorn*, 70 N. Y. 270, 273.

§ 287. N. Y. Rev. Sts., Part 2, c. 1, tit. 2, art. 2, § 57,

provide that the surplus of rents and profits of land held in trust beyond what is necessary for the education and support of the *cestui que trust* shall be liable, in equity, to his creditors. Part 3, c. 1, tit. 2, art. 2, §§ 38, 39, provide that, when an execution is returned unsatisfied, the creditor may bring a bill to have his debt satisfied out of any property held in trust for the debtor, except where the trust has been created by some person other than the debtor. See § 281, *ante*. Three modes have been suggested of dealing with these contradictory provisions.

§ 288. *First*. That §§ 38, 39, forbid only the taking of the principal of trust funds created for a debtor, but leave it open to take the surplus of the income. This view seems to be confined to Chief Judge Denio and Judge Johnson. The former states and defends it in his dissenting opinion in *Graff v. Bonnett*, 31 N. Y. 9, 25-30.

§ 289. *Second*. That the exception in §§ 38, 39, practically leaves the creditor without a remedy. This was said by Wright, J., to be his opinion, in *Campbell v. Foster*, 35 N. Y. 361, 373. See *Stewart v. McMartin*, 5 Barb. 438, 444; *Locke v. Mabbett*, 2 Keyes, 457, 460; s. c. 3 Abb. Ct. App. 68; *Parker v. Harrison*, 10 Jones & Sp. 150. The opinion in *Campbell v. Foster* was followed, apparently with reluctance, in *Hann v. Van Voorhis*, 5 Hun, 425; and see accordingly *Miller v. Miller*, 7 Hun, 208. It should be observed that the case of *Campbell v. Foster* is one of those relied on by Miller, J., in his opinion in *Nichols v. Eaton*, 91 U. S. 716, 729.

§ 290. *Third*. But this latter doctrine is now distinctly overruled, and it is settled that the surplus income of a trust fund not necessary for the support and maintenance of the *cestui que trust* can be reached by a creditor's bill.

The case of *Williams v. Thorn*, 70 N. Y. 270, (followed in *McEvoy v. Appleby*, 27 Hun, 44,) is a unanimous decision of the Court of Appeals, that in a proceeding like a creditor's bill against a trust fund, consisting of both realty and personalty, the surplus income beyond what is necessary for the suitable support of the debtor and those dependent on him, is applicable to the payment of his creditors; and that this is true not only of the accrued income, but — overruling on this point *Clute v. Bool*, 8 Paige, 83; and see *Bryan v. Knickerbocker*, 1 Barb. Ch. 409, 427; *Graff v. Bonnett*, 2 Robertson, 54; *Sillick v. Mason*, 2 Barb. Ch. 79, 82; *Scott v. Nevius*, 6 Duer, 672 — that the accruing income will be ordered applied in like manner. [See *Williams v. Thorn*, 81 N. Y. 381.] The only question left open is whether the *whole* of the personalty cannot be reached by the creditors.

§ 291. That such surplus can be reached by creditors has also been held in *Sillick v. Mason*, 2 Barb. Ch. 79; *Rider v. Mason*, 4 Sandf. Ch. 351; *Miller v. Miller*, 1 Abb. N. C. 30; [*Tolles v. Wood*, 99 N. Y. 616;] and has been said or assumed in many cases; e. g. *Hallett v. Thompson*, 5 Paige, 583; *Clute v. Bool*, 8 Paige, 83; *De-granc v. Clason*, 11 Paige, 136; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Craig v. Hone*, 2 Edw. Ch. 376, 554, 570; *Bramhall v. Ferris*, 14 N. Y. 41, 46; *Graff v. Bonnett*, 2 Robertson, 54; s. c. 31 N. Y. 9; *Noyes v. Blakeman*, 3 Sandf. S. C. 531; s. c. 6 N. Y. 567; *Cruger v. Jones*, 18 Barb. 467; *Genet v. Beckman*, 45 Barb. 382; *Scott v. Nevius*, 6 Duer, 672; *Moulton v. De ma Carty*, 6 Robertson, 533; *Genet v. Foster*, 18 How. Pr. 50. [See *Sargent v. Bennett*, 3 How. Pr. N. S. 515.]

§ 292. Although this surplus can be reached by creditors, the *cestui que trust* cannot alienate it by any voluntary conveyance; [*Tolles v. Wood*, 99 N. Y. 616; and see *Estate of Hoyt*, 12 N. Y. Civ. Proc. 208;] and therefore property held in trust for the separate use of a married woman is not liable for her debts, because a married woman's debts can affect her separate estate only by way of charge. *L'Amoureux v. Van Reusselaer*, 1 Barb. Ch. 34. *Rogers v. Ludlow*, 3 Sandf. Ch. 104. *Noyes v. Blakeman*, 3 Sandf. S. C. 531; s. c. 6 N. Y. 567.

§ 293. This surplus can be reached only by a proceeding in the nature of a creditor's bill, and not by proceedings supplementary to execution, if the income has not yet accrued; *Scott v. Nevius*, 6 Duer, 672; *Campbell v. Foster*, 16 How. Pr. 275; s. c. 35 N. Y. 361, 373; or even if it has accrued; *Locke v. Mabbett*, 2 Keyes, 457; s. c. 3 Abb. Ct. App. 68; *Genet v. Foster*, 18 How. Pr. 50; [*McEwen v. Brewster*, 17 Hun, 223.] See *Graff v. Bonnett*, 2 Robertson, 54; s. c. 31 N. Y. 9; [*De Camp v. Dempsey*, 10 N. Y. Civ. Proc. 210.]

§ 294. To determine what is necessary for the education and support of a *cestui que trust*, and what standard of expense is to be taken, is obviously a difficult task for a court of equity. In what condition of life is a man entitled to be supported as against his creditors? See *Clute v. Bool*, 8 Paige, 83, 87; *Sillick v. Mason*, 2 Barb. Ch. 79; *Genet v. Beekman*, 45 Barb. 382; *Moulton v. De ma Carty*, 6 Robertson, 533; *Scott v. Nevius*, 6 Duer, 672, 677; *Campbell v. Foster*, 35 N. Y. 361, 373.

§ 294 a. [In *Tolles v. Wood*, 99 N. Y. 616, a judgment creditor brought a suit against trustees under a will who held property in trust to pay the income to W., to reach

the surplus income in their hands. The net income since the beginning of the suit, about ten months, was \$4,159.86; of this the trustees had paid the beneficiary \$1,375, and at his request had paid \$1,909.80 interest upon a debt due from him, and also \$708.82 premiums upon policies of life insurance given by him as security for debts. The Court as to the amount of these last two sums said that "actual experiment had demonstrated that it was not needed" for W.'s support, and that the plaintiff was entitled to judgment for it.]

§ 294 *b*. [In *Kilroy v. Wood*, 42 Hun, 636, another judgment creditor proceeded against the same defendants. The opinion says: W. "is, as claimed in the defendants' points, a gentleman of high social standing, whose associations are chiefly with men of leisure, and is connected with a number of clubs, with the usages and customs of which he seems to be in harmony both in practice and expenditure, and it is insisted on his behalf that his income is not more than sufficient to maintain his position according to his education, habits, and associations. And this may be so, yet it would seem that evidence might have been adduced which would establish his ability to live upon a smaller sum than the whole income, and thus relieve himself from the burden of a debt which seems to have been justly contracted." But the Court held that the plaintiff had shown no sufficient evidence of this.]

§ 294 *c*. [Stow v. Chapin, 4 N. Y. Supp. 496 (1889). Suit to enforce judgments for \$60,000 against Howell Osborne, to reach the surplus income in the hands of the trustees under his father's will. This will gave the trustees \$500,000 in trust to apply the income to the use of Howell Osborne for life, and on his death to convey the

principal to his next of kin. The plaintiff alleged that the annual income was about \$25,000; that the debtor, as the plaintiff was informed and believed, was unmarried and had no children, house, or other establishment to maintain; and that \$2,500 would be a reasonable, fair, ample, and sufficient income for him. The Court held that there had been no proper service on the parties, but continued thus: "There is another ground upon which the Court was also justified in denying the motion, and that is that there is no proof whatever contained in these papers as to what would be a sufficient income for the defendant Osborne. . . . He is entitled to have so much of said fund as may be necessary to support him in the style in which he had been accustomed to live, and in which he had been brought up by his father, and for the maintenance of which this provision was made in the will of the father. It is not for the creditor to say that his debtor should live on two dollars a day or one dollar; that such a sum will keep the debtor from starvation, or that it will prevent his being clothed in rags. There is no such rule in cases of this description. The testator has the right to do as he pleases with his money, and if he desires to make provision for the support of a profligate son in such a manner that he cannot reach or anticipate this fund, or the income thereof, he has the right to do so, and he has the right to afford him the means of living in the manner in which he has brought him up, and to which he has been accustomed, and the creditor can claim only that which is in excess of this amount; and that such excess exists must be established by allegations of fact." The Court held that there was no sufficient evidence of this. See also *Estate of Hoyt*, 12 N. Y. Civ. Proc. 203, 220.]

§ 294 *d.* [*Cord v. Meinke*, 72 Hun, 299. Suit on a judgment for \$163.35 against Mary H. Meinke, to reach the surplus income of a fund yielding \$2,186.96 annually. A witness offered by the plaintiff testified that he supported a family of five persons and had two servants, in Brooklyn, where the defendant resided, for \$1,400 a year. The Supreme Court dismissed the suit.]

§ 295. Whether an annuity payable out of rents and profits is alienable and liable for debts, or whether it is inalienable and not liable for debts, is left very doubtful on the authorities. In *Hawley v. James*, 16 Wend. 61, the matter was much discussed; but the result is not clear. In the same case, before Walworth, C., 5 Paige, 318, 461, and in *Gott v. Cook*, 7 Paige, 521, 535, the Chancellor seems to have thought that an annuity was alienable; but in *Clute v. Bool*, 8 Paige, 83, 86, he says that, since the decision of the Court of Errors in *Hawley v. James*, he concludes he must have been wrong. In *Degraw v. Clason*, 11 Paige, 136, he held that an annuity charged on realty and personalty was liable for debts; [followed in *Gifford v. Rising*, 51 Hun, 1; s. c. 55 Hun, 61.] In *Rider v. Mason*, 4 Sandf. Ch. 351, the Vice-Chancellor seems to have thought that creditors could reach so much of an annuity (and only so much) as was not needed for support; and a like decision was made in *Stewart v. McMartin*, 5 Barb. 438, 444, 445, an annuity being thought to be inalienable under the case of *Hawley v. James*. On the other hand, in *Lang v. Ropke*, 5 Sandf. S. C. 363, it was held, on the strength of *Hawley v. James*, that an annuity was alienable. In *Griffen v. Ford*, 1 Bosw. 123, a testator gave realty and personalty to trustees, "to take, appropriate, and apply so much thereof as shall be necessary and

proper for and towards the suitable support and comfortable maintenance of my wife." It was held that the wife's interest was in its nature an annuity, and therefore alienable. If this be law, it will not be difficult to evade the provision against the alienation of trust estates; and the case perhaps shows the fallacy of attempting to distinguish between the payment of rents and profits, and the payment of an annuity out of rents and profits; and that under the Revised Statutes both of such interests must be regarded as inalienable, [and so it has been at last ruled by the Court of Appeals in *Cochrane v. Schell*, 140 N. Y. 516. See also Chaplin, Susp. of Al. §§ 233 *et seqq.*; and Bolles, Susp. of Al. §§ 36, 37].

B. *Other States.*

§ 296. Besides [Illinois, § 124 *r, ante*,] New Jersey, §§ 191, 192, *ante*, and Tennessee, §§ 240 *t*–240 *x, ante*, several States have copied in whole or in part the legislation of New York; e. g. California, Civil Code (1872), §§ 857, 859, 867, as amended in 1874; [Indiana, Rev. Sts. of 1881, § 2972;] Kansas, 2 Gen. Sts. of 1889, § 7162; Michigan, 2 Comp. Laws (1882), §§ 5573, 5575, 5581, 6614, 6615; Minnesota, Rev. Sts. (1866), c. 43, §§ 11 (amended St. 1875, c. 53), 13, 19; [North and South Dakota, Dak. Comp. Laws (1887), §§ 2798, 2800, 2808;] Wisconsin, Rev. Sts. (1878), §§ 2081 (as amended by St. of 1883, c. 290), 2083, 2089, 3029. [See also the Statutes of the Territory of Oklahoma (1893), §§ 3762, 3764, 3771. There have been a few cases under these statutes. *Locke v. Barbour*, 62 Ind. 577. *Collier v. Blake*, 14 Kan. 250. *Cummings v. Corey*, 58 Mich. 494. *Arzbacher v. Mayer*,

53 Wis. 380. *Sumner v. Newton*, 64 Wis. 210, § 194 *b*, *ante*. *Lamberton v. Pereles*, 87 Wis. 449, § 194 *a*, *ante*.] Cf. *Hexter v. Clifford*, 5 Color. 168.

APPENDIX II.

CASES DECIDED TOO LATE FOR INSERTION IN THE TEXT.

§ 296 *a*. [*Ernst v. Shinkle*, 95 Ky. 608, is an additional authority that an inhibition to sell land devised is void. See also *Meek v. Briggs*, 87 Iowa, 610. In this latter case land and money were devised and bequeathed to B., and trustees were appointed to receive, manage, and control the property devised, with full power to take possession, to collect the rents and invest the money, applying the income to the support, comfort, and education of B.; the trust to continue until, in the judgment of the trustees, B. should become fully competent and worthy to be intrusted with the sole care and power of control of the property, or until B. should be married to some competent or worthy man. In either case, when they were satisfied that the property would be safely cared for, they might surrender it to B., and the title should then vest absolutely in her. The Court held that B. had an equitable fee, which could not be reached by a creditor of B. on garnishee process against the trustees, which is very likely correct. The language of the Court, however, seems to imply that a creditor could not reach the fund in equity. This is clearly wrong.]

§ 296 *b*. [In *Marston v. Carter*, 12 N. H. 159, § 139, *ante*, a legal life interest in furniture was held not to be

attachable for the debts of the life tenant ; this was for the sake of the remaindermen. In *Lee v. Enos*, 97 Mich. 276, a testator devised land to his two sons for their lives, "subject to the conditions hereinafter mentioned," and he directed them to allow his widow "the use and occupancy of our present dwelling-house, yard, and garden, and keep for her use a good, safe, and substantial horse, harness, buggy, and cutter for her use, and give her of the produce of said farm all she may require for her maintenance and support." Both sons abandoned the land, and refused to furnish anything further for the support of the widow. The Court held that the life estate of the sons in the land could not be taken on execution against them. See § 172, *ante*.]

§ 296 c. [That a direction to accumulate the income of a vested fund given to a charity is wholly void, has now been settled in England in the most authoritative manner. *Harbin v. Masterman*, [1894] 2 Ch. 184, affirmed in the House of Lords *sub nom. Wharton v. Masterman*, [1895] A. C. 182. In other words, the doctrine of *Saunders v. Vautier* is as applicable to a charity as to an individual. But see *Woodruff v. Marsh*, 63 Conn. 125, 137, where the accumulation of \$10,000 out of the income of a fund of \$400,000, to continue for a hundred years, was declared to be good ; and also the case of *St. Paul's Church v. Attorney General*, decided by the Supreme Judicial Court of Massachusetts, in 1895, but not yet reported.]

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